92-880

No. _____

Supreme Court, U.S.
FILED
NOV 18 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

KAI DAVID MIDBOE, Secretary
of the Louisiana Department
of Environmental Quality,

Petitioner,

versus

CHEMICAL WASTE MANAGEMENT, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does Congressional authorization of Louisiana's hazardous waste program, pursuant to the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. §§ 6901-6992) and associated federal regulations, allow Louisiana to prevent through La. R.S. 30:2190 and 2191 (A30-A32) the importation of hazardous waste from foreign nations for treatment, storage, or disposal?

II. Is hazardous waste, generated in and environmentally regulated by foreign nations, an "object of commerce," for the purposes of the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3?

III Is the reasoning of *Maine v. Taylor*, 477 U.S. 131 (1986), and the "quarantine cases," as opposed to that of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), more appropriate to test the constitutionality of La. R.S. 30:2190 and 2191?

IV. Does an Executive Agreement (A44-A53) and Annex III to that Agreement (A54-A71), neither of which were ratified by the Senate, prevail over state law which is determined constitutional under either Question I above (pursuant to Congressional authorization) or under Question III above (pursuant to *Maine v. Taylor* and the "quarantine cases")?

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DECISIONS BELOW

On September 2, 1992, the United States Fifth Circuit Court of Appeals denied the Petition for Panel Rehearing by Petitioner. The decision is reproduced in the Appendix at A29. The opinion of the Fifth Circuit Court of Appeals is reported as *Chemical Waste Management, Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992), and is reproduced in the Appendix at A1-A3.

The opinion of the United States District Court is reported as *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. 1142 (M.D. La. 1991), and is reproduced in the Appendix at A4-A28.

JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on August 10, 1992, and denied Petitioner's petition for panel rehearing on September 2, 1992.

This Court has jurisdiction to review the Court of Appeals judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. art. I, § 8, cl. 3:

   > [THE CONGRESS SHALL HAVE POWER] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes. (First bracketed portion from U.S. Const. art. I, § 8, cl. 1.)

2. La. R.S. 30:2190 (West 1992) is reprinted in full in the Appendix at A30-A31.

3. La. R.S. 30:2191 (West 1992) is reprinted in full in the Appendix at A31-A32.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below

On October 5, 1989, Respondent Chemical Waste Management, Inc. (Chem Waste) sought a declaratory judgment from the United States District Court, Middle District of Louisiana,[1] to the effect that La. R.S. 30:2190 and 2191 (A30-A32) are unconstitutional. These two state statutes prohibit the treatment, storage, or disposal in Louisiana of hazardous waste from foreign nations. Additionally, Chem Waste initially sought injunctive relief barring Petitioner[2] from enforcing the statutes against it.

The Secretary answered and counterclaimed on October 31, 1989, seeking a declaratory judgment that the statutes are constitutional. Further, the Secretary sought to enjoin Chem Waste from receiving hazardous waste from another country for the purposes of treatment, storage, or disposal during the pendency of this case.

Subsequently, the parties entered into a Stipulation. A33-A43. Paragraph 18 of the Stipulation (A39-A40) provides that during the pendency of this suit Chem Waste will not "receive in the State of Louisiana for the purposes of treatment, storage or disposal in the State of

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[1] The district court had subject matter jurisdiction under 28 U.S.C. § 1332.

[2] Petitioner is Kai David Midboe, Secretary of the Louisiana Department of Environmental Quality (LDEQ), who replaced Paul H. Templet, Ph.D., as Secretary. Petitioner is referred to hereinafter as the Secretary, LDEQ, the Department, or the State.

Louisiana, any 'hazardous waste generated outside the United States and its territories'."

Based upon Paragraph 18 of the Stipulation (A39-A40), both parties agreed to withdraw their respective actions for injunctive relief and to file cross motions for summary judgment on the issue of the constitutionality of La. R.S. 30:2190 and 2191 (A30-A32). The trial court heard the cross motions for summary judgment and denied both of them without prejudice to either party. Trial of the case was held on August 6-8, 1990.

Chem Waste argued that the Louisiana statutes "are inconsistent with the federal statutory provisions under RCRA and violate both the Commerce Clause and the Supremacy Clause of the United States Constitution." *Chemical Waste Management, Inc. v. Templet*, A8.

By judgment dated July 9, 1991, the trial court declared La. R.S. 30:2190 and 2191 unconstitutional under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, finding that the two statutes impermissibly burdened both interstate and foreign commerce. A4, A28. Moreover, the trial court issued a permanent injunction enjoining the administration and enforcement of La. R.S. 30:2190 and 30:2191. A28. The court did not consider it necessary to decide whether La. R.S. 30:2190 and 2191 were "valid and effective under RCRA." A13.

The LDEQ gave Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. On August 10, 1992, the appellate court affirmed the trial court's decision, finding that La. R.S. 30:2190 and 2191 violated dormant Commerce Clause provisions. A1. This affirmation occurred even though Chem Waste and the trial court acknowledged that Louisiana's hazardous waste program has been authorized through RCRA since 1985 and

included the two questioned statutes. A12. The Fifth Circuit concluded that the authorization of Louisiana's hazardous waste program was not an unmistakable expression of Congressional approval. A3.

The Fifth Circuit denied the LDEQ's application for panel rehearing on September 2, 1992. A29.

B. Facts of the Case[3]

Chem Waste notified the USEPA, Region VI, by letters dated September 22 and 28, 1989, that it intended to import hazardous waste from Mexico into Louisiana; the waste was destined for treatment, storage, or disposal in a landfill at Chemical Waste Management, Inc., Carlyss, Louisiana.

The Regional Administrator for USEPA informed Chemical Waste that, since the authority (40 CFR § 264.12) regarding notice of importation had been delegated to Louisiana, a RCRA-authorized state, Chemical Waste's notices of importation had been forwarded to the LDEQ.

Chem Waste's notices established that two hazardous wastes would be imported, both of which originate from "maquiladoras" companies.[4] One waste is from a corporation named Inland System Business Unit (Inland) of Inland/Matamoras, Mexico. Inland hopes to move the hazardous waste through a transfer facility based in Texas, named Valley Solvents, Inc. Valley Solvents is to

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[3] Facts of the case follow those set forth in the trial court opinion, A4-A28, and in the Joint Stipulation, A33-A43.

[4] *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1144 & n.3, 1145 (A5-A6). "Maquiladoras" are Mexican companies incorporated under Mexican law which may be 100% foreign owned and/or managed. These corporations are allowed to import raw materials and components duty-free. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 Int'l Law. 223 (1989).

import the hazardous waste from Inland and transport it into Louisiana. Stipulation, Paragraph 23 (A41).

The other hazardous waste is from a corporation named Trico Componentes, S.A. De C.V. (Trico-Mexico) of Matamoras, Tampique, Mexico. Trico Technologies Corporation (Trico-USA), a Delaware corporation with a transfer facility located in Texas, plans to import the waste from Trico-Mexico. A second Texas-based company, Texas Ecology, Inc., hopes to transport the hazardous waste into Louisiana. Stipulation, Paragraph 24 (A41).

Chem Waste contends that the importation of the waste from the two "maquiladoras" companies is authorized by Annex III of an Executive Agreement entitled, "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" (the Agreement).[5] The Agreement was signed August 14, 1983, and became effective February 16, 1984; it was not ratified by the Senate.[6]

Pursuant to Article III of the Agreement, the parties entered into the "Agreement of Cooperation Between the

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[5] *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1145 & n.6. A6-A7. Annex III (A54-A71) concerns "Transboundary Shipments of Hazardous Wastes and Hazardous Substances." Annex III, art. XI (A65), provides:

> Hazardous waste generated in the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations.

[6] *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1145 & n.6 (A7); Stipulation, Paragraph 11 (A37).

United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances" (Annex III). Annex III was signed on November 12, 1986. Stipulation, Paragraph 11 (A37).

REASONS TO GRANT THE WRIT

I. This Court Should Grant the Writ to Determine Whether Congressional Authorization of Louisiana's Hazardous Waste Program, Pursuant to the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. §§ 6901-6992) and Associated Federal Regulations, Has Occurred, Thus Allowing Louisiana to Prevent Through La. R.S. 30:2190 and 2191 (A30-A32) the Importation of Hazardous Waste from Foreign Nations for Treatment, Storage, or Disposal.

This Court has never addressed the issue of whether a state's hazardous waste program which has been Congressionally authorized through RCRA[7] insulates the laws of that program from Commerce Clause challenge.[8]

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[7] 40 CFR § 271.

[8] No significant antidelegation principle restricts the exercise of the commerce power where Congress enacts laws that allow states to independently regulate commerce. *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U. S. 82 (1984); *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985); *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648 (1981). Such Congressional laws merely involve a federal authorization of the states' various structures for commerce. In cases where this has occurred, the commerce clause is not "dormant," and it does not restrict state law because Congress has exercised its power and approved the law. As long as Congress has the power to regulate a subject matter, such as hazardous

However, in 1984 the Court set forth and explained the test for Congressional authorization of a state statute. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984). That test is, "an express statement of congressional policy prior to finding that state regulation is permissible." *Id.* at 90. The Court conceded that there is no "talismanic significance to 'expressly stated.'" *Id.* at 91.

Although the Court in *South-Central Timber Dev., Inc.* found no Congressional authorization of an Alaska state statute and reversed, the case is distinguishable from the present proceeding.[9] *South-Central Timber Dev., Inc.*

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waste, it can authorize state laws on that subject. Otherwise, the plenary and pervasive power of Congress to regulate and prohibit commerce could not be exerted. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to Constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S. at 174.

[9] In *South-Central Timber*, the Alaska Department of Natural Resources published a notice of sale of timber in the area of Icy Cape, Alaska. The notice of sale and other relevant documents all provided, pursuant to state statute, that "primary manufacture" or partial processing of the timber would be required in Alaska as a part of the contract.

The *South-Central Timber* plaintiff sought an injunction claiming that the state statute violated the negative implications of the Commerce Clause, that is, the limitations on state authority. The federal district court agreed with plaintiff, but the U.S. Ninth Circuit reversed, finding it unnecessary to determine whether the Commerce Clause was violated. This was so because the appeals court recognized implicit congressional authorization in the federal policy of imposing a primary-manufacture requirement on timber taken from federal land in Alaska.

There was a federal regulation in *South-Central Timber* which prohibited exportation of unprocessed timber from

involved nothing that could be characterized as explicit authorization or even implicit authorization; at most there may have been some sort of argument for inference by analogy. Additionally, the "object of commerce" addressed in *South-Central Timber Dev., Inc.* was timber from National Forest System lands in Alaska, not foreign generated and foreign regulated hazardous waste. *South-Central Timber Dev., Inc.*, unlike *Chemical Waste Management, Inc. v. Templet*, did not involve the grave concerns of human health and safety and environmental integrity.

In the present case, Louisiana received in 1985 final Congressional authorization through RCRA of its state hazardous waste program, which program includes La. R.S. 30:2190 and 2191 (A30-A32).[10] And even Respondent Chem Waste acknowledges that Louisiana is an authorized state under RCRA.[11] The parts of La. R.S. 30:2190 and 2191 at issue are quoted below.

National Forest System lands in Alaska; the prohibition extended to other States, as well as to foreign exports. However, in the regulation there was no affirmative expression of federal approval of a parallel policy with respect to state timber.

[10] 50 Fed. Reg. 3348 (1985); Stipulation, Paragraph 21 (A40); *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1147 (A12). The Federal Register, dated January 24, 1985, vol. 50, p. 3348 states:

> The Environmental Protection Agency (EPA) has reviewed Louisiana's application and has reached a final determination that Louisiana's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization.

[11] *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1147 (A12).

Louisiana Revised Statutes 30:2190 provides:

> C. It shall be unlawful for any person to receive for treatment, storage, or disposal in this state any hazardous waste generated outside the United States or its territories.
>
> D. This Section shall not apply to any hazardous waste generated outside of the United States and its territories which must be disposed of in accordance with the provisions of Public Law 96-478 adopted by the United States Congress and known as the Act to Prevent Pollution from Ships. This Section shall only apply to hazardous waste which is imported into this state directly from a foreign nation.

Louisiana Revised Statutes 30:2191 reads:

> A. The commission or the assistant secretary shall deny hazardous waste transporter licenses and hazardous waste treatment, storage, and disposal facility permits to all persons who propose to transport into and dispose of in Louisiana hazardous waste generated in a country other than the United States.
>
> . . . .
>
> C. The commission shall revoke the permit of any permitted hazardous waste facility which hereafter disposes of hazardous waste generated in a country other than the United States. This power shall be in addition to other powers and remedies available to the Commission under this Subtitle.

Louisiana Revised Statutes 30:2190 was amended in 1984 to address the United States Environmental Protection Agency's (USEPA) concerns with the consistency

requirements of 40 CFR §§ 271.4 (a) and (b).[12] The amendment occurred through Acts 1984, No. 826, authored by Representative Manny Fernandez, and added the last sentence to Part D of La. R.S. 30:2190.

The LDEQ acknowledges that USEPA was justifiably concerned prior to the amendment of La. R.S. 30:2190, part D. As the original statute read, it could be interpreted to ban hazardous waste "from or to other states," and thus, might impermissibly interfere with the consistency requirement of 40 CFR § 271.4, particularly part (a) quoted above. The amendment clarified the statute and assured that La. R.S. 30:2190 would apply only to waste which does not undergo some processing or other activity en route, thereby defining it as being "from" another state.

Regardless, the U.S. Fifth Circuit found no Congressional authorization where Congress through RCRA had previously approved Louisiana's hazardous waste program, including La. R.S. 30:2190 and 2191. *Chemical Waste Management, Inc. v. Templet*, 967 F.2d at 1059 (A3). To reach that conclusion the court relied upon *Hazardous Waste*

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[12] 40 CFR §§ 271.4 (a) and (b) provide:

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (A3).[13]

Petitioner respectfully submits that the ruling in *Hazardous Waste Treatment Council* (*HWTC*) is not binding because it addressed only the merits of a preliminary injunction. There has been no final decision following a trial on the merits. And the *HWTC* court recognized this by limiting its holding as follows:

> 'We hold only that the questions of fact and law raised on the record at this point are, under controlling doctrine, sufficiently serious and grave ones that, when considered with the balance of potential harms, the district court's injunctive order should stand pending trial.' (Citation omitted.)

Hazardous Waste Treatment Council, 945 F.2d at 795.

Additionally, the U.S. Fifth Circuit stated that Louisiana did not present any evidence of Congressional authorization in this case. *Chemical Waste Management, Inc. v.*

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[13] In *Hazardous Waste Treatment Council* the United States Fourth Circuit Court of Appeals affirmed the district court's grant of a preliminary injunction which enjoins South Carolina from enforcing, applying, or attempting to apply portions of two state executive orders, two state statutes, and one regulation, all relating to hazardous waste management. Hazardous Waste Treatment Council (HWTC) argued that the statutes, orders, and regulation violate the Commerce Clause. HWTC contended that Congress' enactment of legislation concerning hazardous waste did not authorize states to burden interstate commerce in a manner otherwise impermissible under the Commerce Clause. In affirming the preliminary injunction granted to HWTC, the Fourth Circuit reasoned, "States may not engage in economic protectionism and RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution." *Hazardous Waste Treatment Council*, 945 F. 2d at 794.

Templet, 967 F.2d at 1059 (A3). Petitioner respectfully submits that this determination is not correct. As stated previously, in 1985 Louisiana received final Congressional authorization through RCRA of its state hazardous waste program, including La. R.S. 30:2190 and 2191.[14]

Finally, the trial court apparently did not consider whether this case involved a question of Congressional authorization. That court found it unnecessary to "determine whether the Louisiana statutes are consistent with RCRA." *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1147 (A13).

Therefore, this Honorable Court should grant the writ to resolve whether Congressional authorization through RCRA of Louisiana's questioned statutes is authorization for the purposes of the Commerce Clause. At stake is human health and safety and the preservation of a sound environment for posterity. Could there be greater state or federal issues?

II. This Court Should Grant the Writ to Determine Whether Hazardous Waste Generated in and Environmentally Regulated by Foreign Nations Is an "Object of Commerce" for the Purposes of the Commerce Clause of the United States Constitution.

Although recently this Court has suggested that hazardous waste is an "object of commerce," it did not state this unequivocally. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2012-13 n.3 (1992).[15] And certainly,

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[14] *See supra* note 10.

[15] *Chemical Waste Management, Inc. v. Hunt* concerned the constitutionality of an Alabama statute which imposed, among other things, an additional fee on hazardous waste generated

this Court has never determined that hazardous waste generated in and environmentally regulated by foreign nations should be considered an "object of commerce," subject to the provisions of the Commerce Clause.

Instead, this Court in *Chemical Waste Management, Inc. v. Hunt* noted that the Alabama Supreme Court had assumed that the "disposal of hazardous waste constituted an article of commerce," and that Alabama had not explicitly argued otherwise. *Id.* Also, it recognized that solid waste, even if it has no value, is an article of commerce, citing *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992), as a reaffirmation of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *Id.* This Court recognized that hazardous waste is a grade of solid waste, although a particularly noxious and dangerous one. *Id.*

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outside, but disposed of inside, the State. Petitioner, Chemical Waste Management, Inc. (Chem Waste), filed suit in state court seeking both declaratory and injunctive relief. The trial court found a base fee and cap provisions of the act constitutional but determined that the additional fee violated the Commerce Clause. Both sides appealed. The Alabama Supreme Court affirmed the rulings on the base fee and cap provisions but reversed the decision on the additional fee. Chem Waste petitioned for writ of certiorari, challenging all parts of the statute. This Court granted certiorari limited to petitioner's Commerce Clause challenge to the additional fee. The importance of the federal question was one of this Court's stated reasons for the grant of review. This Court reversed, finding that Alabama's differential treatment of out-of-state waste violated the Commerce Clause. "No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2012.

The *City of Philadelphia* Court set forth an analysis for determining an "object of commerce," which did not reject the conclusions of the "quarantine cases."[16] The Court explained:

> In saying that innately harmful articles 'are not legitimate subjects of trade and commerce,' the *Bowman* Court was stating its conclusion, not the starting point of its reasoning. All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. In *Bowman* and similar cases, the Court held simply that because the articles' worth in interstate commerce was far out-weighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines.

City of Philadelphia, 437 U.S. at 622.

Thus, an article is not excluded at the beginning based upon a "non-object of commerce" theory; but the article

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[16] *City of Philadelphia*, 437 U.S. at 621-22. The "quarantine cases" are United States Supreme Court decisions which found that certain objects "are not legitimate subjects of trade and commerce." *Bowman v. Chicago & Nw. Ry.*, 125 U.S. 465, 489 (1888). Thus, states could prohibit their transportation across state lines under legitimate exercise of police power. *See Asbell v. Kansas*, 209 U.S. 251 (1908) (Kansas statute requiring inspection by Kansas or federal health inspector of any cattle imported from south of the southern border of the state upheld); *Reid v. Colorado*, 187 U.S. 137 (1902) (Colorado statute prohibiting importation into Colorado of livestock known to be infected or exposed within last 90 days to infected livestock upheld as valid exercise of police power where Animal Industry Act of 1884, 23 Stat. 31, by Congress did not preempt). See also *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, 525 (1935), for a discussion of these and other quarantine cases.

may ultimately be excepted because of its inherent danger, which danger removes it from Commerce Clause protections.

Regardless, neither of the two cases cited in this Court's recent discussion of hazardous waste as an "object of commerce," raised issues of commerce with foreign nations.[17] Similarly, neither *National Solid Wastes Manag. v. Alabama Dep't of Envir.*, 910 F.2d 713 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991), nor *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978), involved foreign commerce.[18]

Therefore, an assumption that hazardous waste is an "object of commerce"[19] may not extend to foreign generated and foreign regulated hazardous waste. To ignore the origin of the waste would effectively undermine the RCRA legislation passed by Congress, since that legislation is premised upon regulation of waste from "cradle to grave."[20]

Petitioner respectfully submits that before any court can review whether Congressional authorization exists for Louisiana to prohibit the importation of hazardous waste generated in and regulated by foreign nations, for

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[17] *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2012-13 n.3, citing *Fort Gratiot Sanitary Landfill, Inc.*, 112 S. Ct. 2019 and *City of Philadelphia*, 437 U.S. 617.

[18] The court in *National Solid Wastes Manag.*, 910 F.2d at 719, concluded that hazardous waste was an "object of commerce," following precedent in its circuit which cited *City of Philadelphia*; it recognized as in accord, *Hardage*.

[19] *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2012-13 n.3.

[20] Legislative History of House Comm. on Resource Conservation and Recovery Act of 1976, H.R.Rep. No. 94-1491, Pt. I, 94th Cong., 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Admin. News, 6238, 6244; *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2011-12 n.1; *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1146 & n.11 (A11).

treatment, storage, or disposal in Louisiana, such waste must be determined an "object of commerce," subject to the Commerce Clause. Before any court can consider, as the trial court and U.S. Fifth Circuit have, that La. R.S. 30:2190 and 2191 violate the dormant Commerce Clause, the waste the statutes prohibit must be determined an "object of commerce."[21]

Moreover, this Court should consider that hazardous waste, particularly that from foreign nations, is not something that our forefathers envisioned when they wrote the Commerce Clause or considered its necessity. With few exceptions, not until the mid-half of the present century did our nation and the world begin to contemplate the specter of a "Silent Spring," with all of its accompanying horrors and social, economic, and political dilemmas. R. Carson, *Silent Spring* (1962).

Based upon the above reasoning, this Court should grant the writ to determine whether hazardous waste generated in and environmentally regulated by foreign nations is an "object of commerce" for the purposes of the Commerce Clause, thereby deciding a crucial federal issue.

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[21] Assuming that an "object of commerce" is implicated, it is well-established law that Congress' power to regulate both foreign and interstate commerce includes the power to restrain or prohibit it at all times for the welfare of the public. *E.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Board of Trustees v. United States*, 289 U.S. 48 (1933); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

III. This Court Should Grant the Writ to Determine Whether the Reasoning of *Maine v. Taylor*, 477 U.S. 131 (1986), and the "Quarantine Cases," as opposed to that of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), Is More Appropriate to Test the Constitutionality of La. R.S. 30:2190 and 2191.

In the present case, the trial court discounted reasoning of *Maine v. Taylor*[22] and the "quarantine cases,"[23] and accepted that of *City of Philadelphia* and *Japan Line* to find that La. R.S. 30:2190 and 2191 unconstitutionally infringed upon interstate and foreign commerce. *City of Philadelphia* and *Japan Line* involved interstate and foreign commerce, respectively. On appeal the U.S. Fifth Circuit also found a violation of dormant commerce power, citing the recent decision of *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2016-17 (A2). The Fifth Circuit did not address foreign commerce.

Prior decisions regarding quarantine laws or the decision in *Maine* did not affect the *Chemical Waste Management, Inc. v. Hunt* holding.[24] However, *Chemical Waste Management, Inc. v. Hunt* raised no concerns of hazardous waste generated in and regulated by foreign nations.

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[22] In brief, the *Maine v. Taylor* Court upheld a state ban on the importation of live baitfish after Maine established that such fish could introduce foreign parasites and non-native species and that there was no less discriminatory means of protecting its natural resources. The court in *National Solid Wastes Manag. v. Alabama Dep't of Envir.*, 910 F.2d 713, 720 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991), labeled *Maine* a "quarantine case," finding that it fell within an exception to the Commerce Clause; the Court in *Maine* did not refer to the "quarantine cases."

[23] *See supra* note 16.

[24] *See supra* notes 15, 16, and 22.

A. *Maine v. Taylor*

In *Maine* Defendant Taylor had arranged to import live baitfish into Maine, despite a state statute[25] prohibiting such importation. The statute was broad enough to include both interstate and foreign commerce situations. Subsequently, Taylor was indicted under the federal Lacy Act which made it a federal crime to transport fish in interstate or foreign commerce in violation of state law.

Defendant Taylor moved to dismiss the indictment on the ground that the Maine statute unconstitutionally burdened interstate commerce. The State of Maine intervened to defend the constitutionality of its statute. After an evidentiary hearing, the trial court denied defendant's motion to dismiss and upheld the constitutionality of the state statute.

Holding the state statute unconstitutional in light of the Commerce Clause, the United States First Circuit Court of Appeals reversed. Maine appealed, arguing that the statute's ban legitimately protected the State's fisheries from inadvertent introduction of parasites and nonnative species which could be included in shipments of live baitfish.

The *Maine* Court reversed, even though it determined that the import ban affirmatively discriminated against interstate commerce and applied to the statute the Court's more demanding scrutiny. *Maine*, 477 U.S. at 138. The Court explained that where a state law discriminates

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[25] The Maine statute, M.R.S.A. § 7613, provides: "A person is guilty of importing live bait if he imports into this state any live fish, including smelts, which are commonly used for bait fishing in inland waters."

against interstate commerce either on its face or in practical effect, the state must show: 1) that the statute serves a legitimate local purpose; and 2) that this purpose cannot be served as well by available nondiscriminatory means. *Maine*, 477 U.S. at 138, 140, citing *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

After applying the strict requirements of *Hughes*, the *Maine* Court agreed with the trial court that, "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Maine*, 477 U.S. at 148.

Additionally, the Court agreed there was no available nondiscriminatory means and stated:

> More importantly, we agree with the District Court that the "abstract possibility," (citation omitted) of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an "[a]vailabl[e] . . . nondiscriminatory alternativ[e]," (citation omitted) for purposes of the Commerce Clause.

Id. at 147.

Thus, the Court in *Maine* determined that the two parts of the *Hughes* test were satisfied, despite recognizing "a virtually *per se* rule of invalidity" for state laws that shield in-state industries from out-of-state competition. *Id.* at 148-51. The Court reasoned that not all intentional barriers to interstate commerce are protectionist; that is, absent a prohibition by Congress, the Commerce Clause does not allow unbridled importation into a state regardless of the effect on the local community. *Maine*, 477 U.S. at 149 n.19, citing *Robertson v. California*, 328 U.S. 440, 458 (1946).

Significantly, the Court noted that even overt discrimination against commerce may be allowed, where "outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecti[on]." *Maine*, 477 U.S. at 149 n.19, quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43 (1980).

Further, the *Maine* Court acknowledged:

> Appellee [Taylor], of course, is free to work on his own or in conjunction with other bait dealers to develop scientifically acceptable sampling and inspection procedures for golden shiners; if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded. (Brackets added.)

Maine, 477 U.S. at 147.

Moreover, the Court recognized that Maine was not required "to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences. 585 F. Supp., at 397." *Id.* at 148.

B. *City of Philadelphia v. New Jersey*

The issue in *City of Philadelphia* was whether a New Jersey statute which prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State," violated the Commerce Clause. *City of Philadelphia*, 437 U.S. at 618. Pursuant to this statute New Jersey had closed its borders to all waste from other States. Plaintiffs/Appellants were operators of private landfills in New Jersey and several

cities in other States that had agreements with the operators.

As stated previously, the *City of Philadelphia* Court addressed the meaning of "object of commerce," finding that the questioned waste implicated constitutional protection. *Id.* at 622. Also it set forth a test utilized by the trial court:

> [W]here simple economic protectionism is effected by state legislation a virtually *per se* rule of invalidity has been erected. (Citations omitted.) The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. (Citation omitted.) But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*, [397 U.S. 137 (1970)]. . . .

Id. at 624.

The *City of Philadelphia* Court determined that it made no difference whether the ultimate goal of the New Jersey statute was to reduce waste disposal costs of the State's residents or to save remaining open lands from pollution. *Id.* at 626.

> But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-27.

The Court in *City of Philadelphia* refused to validate on a quarantine theory New Jersey's statute and distinguished the New Jersey situation from the quarantine cases as follows:

> But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.

Id. at 629-30.

However, now Chief Justice Rhenquist in his dissenting opinion stated:

> I simply see no way to distinguish solid waste, on the record of this case, from germ-infected rags, diseased meat, and other noxious items. . . . I think it far from clear that the State's law has as limited a focus as the Court imputes to it: Solid waste which is a health hazard when it reaches its destination may in all likelihood be an equally great health hazard in transit. . . . Even if the Court is correct in its characterization of New Jersey's concerns, I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.

Id. at 632-633 (Rhenquist, J., dissenting).

Notably, *City of Philadelphia* did not involve concerns of foreign commerce in hazardous waste.

C. *Japan Line, Ltd. v. County of Los Angeles*

The issue in *Japan Line* was "whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." *Japan Line*, 441 U.S. at 444. Appellants in the Supreme Court were Japanese shipping companies who had paid under protest California ad valorem property taxes assessed against their cargo shipping containers. The reusable metal containers, like the ships that carried them, were owned by appellants, had their home ports in Japan, and were used exclusively in the transportation of cargo in foreign commerce. *Id.* at 436.

None of the containers remained permanently in the United States, but instead, were in constant transit, except for repair and loading and unloading time. The containers were not involved in any intrastate or interstate commerce, except as continuations of international voyages. *Id.* at 436-37.

The *Japan Line* Court found to uphold the tax would frustrate federal uniformity, and only Congress has the authority to tax foreign commerce. *Id.* at 453, 457. No Congressional authorization of a state tax on foreign owned property transiting through a state was raised. *Japan Line* concerned a tax on inert metal containers, not treatment, storage, or disposal of foreign generated and foreign regulated hazardous waste.

In the present case, the trial court only briefly discussed the influence of *Japan Line* on finding a foreign

commerce violation. *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1152 & n.52. The appeals court did not consider foreign commerce whatsoever and did not cite *Japan Line*.

Because the federal question of proper handling of foreign generated and regulated hazardous waste is so important for the present and future well-being of the entire United States, this Court should address anew the impact of the "quarantine laws" and the *Maine* decision. It should not accept without question the reasoning of *City of Philadelphia* and *Japan Line*.

IV. This Court Should Grant the Writ to Determine Whether an Executive Agreement (A44-A53) and Annex III to That Agreement (A54-A71), Neither of Which Were Ratified by the Senate, Prevail Over State Law, Which State Law Is Determined Constitutional Under Question I above (Pursuant to Congressional Authorization) or Question III above (Pursuant to the "Quarantine Cases" and *Maine v. Taylor*).

An executive agreement entitled "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" (the Agreement), was signed August 14, 1983, by both Parties, including the President of the United States, but not ratified by the Senate.[26] The Agreement became effective February 16, 1984.[27]

Pursuant to Article III of the Agreement, the parties entered into the "Agreement of Cooperation Between the

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[26] *See supra* note 6; A44.

[27] *Id.*

United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances" (Annex III), signed by both parties on November 12, 1986, but not ratified by the Senate.[28]

In the initial Agreement there are provisions recognizing the domestic laws of each party. Examples include Articles 5, 7, 15, and 18 (A46, A47, A50, and A51, respectively).[29] Also, in Annex III there are numerous statements regarding the respect that Annex III accords to the domestic laws of both parties. Examples include Articles II(1), II(2), and III(6) (A57, A58, and A60, respectively).

Thus, it appears that, in reviewing whether the Agreement and the Annex to the Agreement prevail over Louisiana's questioned statutes, this Court must consider whether the documents on their face protect either of the parties' conflicting domestic law; and if not, whether Congressionally authorized state law would override any impact from the documents.

Three leading cases addressing the impact on domestic law of executive agreements are *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); and *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). Although helpful, none of these three cases resolves a conflict between an executive agreement and a

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[28] *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. at 1145 & n.6 (A7); Stipulation, Paragraph 11 (A37); Annex III (A71).

[29] A commentator noted in 1984: "[T]he Agreement specifies that its provisions are subordinate to existing state and national laws and national regulations and policies." Goldstein, *International Agreements*, 25 Harv. Int'l L. J. 239, 241-242.

Congressionally authorized state law where, as here, the Agreement was signed before the state law was authorized and the operative Annex to that Agreement was set in place after the authorized state law.

Belmont arose from an executive agreement, the Litvinov Assignment, between the United States and the Soviet Government. The Assignment was part of an exchange of correspondence between President Roosevelt and the Soviet Union, whereby diplomatic recognition was extended to the Soviet Union. As a result of the Assignment, all claims due to the Soviets by American nationals passed to the United States.

Pursuant to the Assignment, the United States brought an action against a New York bank in federal district court to recover money deposited by a Russian corporation. The corporation had been dissolved and its assets nationalized by the Soviets. Therefore, the United States contended that the bank owed the money to the United States since the deposit was one owed by an American national to the Soviet government.

The defendant banker contended that the Litvinov Assignment did not affect property in the United States. Also, since the Assignment involved confiscation, it was contrary to the public policy of New York.

The *Belmont* Court rejected defendant's argument and reversed, finding the Assignment a valid international agreement. The Court explained:

> We do not pause to inquire whether in fact there was any policy of the state of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

Belmont, 301 U.S. at 327.

United States v. Pink involved a dispute between the United States and New York over the title to the New York assets of a Russian insurance company. Like *Belmont*, it arose as a result of the Litvinov Assignment, and it reinforced the Court's position on the effect of an executive agreement on contrary state policy.

In 1918 and 1919 the Russian government had nationalized the business of insurance and all associated property wherever situated, including foreign assets. In 1933, the United States recognized the Soviet government, and the President of the United States concluded an agreement, the Litvinov Assignment, with the Soviets.

By the terms of the agreement, the Soviet Union assigned its interests in the assets of the Russian insurance company located in New York to the United States government. Thereafter, beginning in 1934 the United States sought to recover the New York assets, eventually instituting a suit in state court which culminated in the *Pink* Supreme Court decision.

This Court reversed, finding that New York state court's policy, which did not recognize the Soviet government and the Litvinov Assignment, contradicted the executive agreement made by the President of the United States with the U.S.S.R. New York must recognize the provisions of the Assignment, which gave the United States the Soviet's right to the New York property.

The *Pink* Court stated:

> It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. . . . But state law must yield when it is inconsistent with or impairs the policy or provisions of a

> treaty or of an international compact or agreement.

Pink, 315 U.S. at 230-231.

Actually, the "state law" overridden in both *Belmont* and *Pink* was only public policy as declared by the respective state courts. *Belmont*, 301 U.S. at 327; *Pink*, 315 U.S. at 231.

Capps concerned an executive agreement between the United States and Canada. The agreement allowed Canada to export seed potatoes to a United States importer only on condition that the contract of purchase would include an assurance by importer that potatoes would not be diverted or reconsigned for table stock purposes. The agreement was not authorized by Congress and contravened provisions of a federal statute dealing with the same matter.

In finding the agreement void and a contract based on the agreement unenforceable in the United States, the *Capps* Court said:

> We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. . . . [T]he regulation of imports from foreign countries is a matter for Congress and, when Congress has acted, the executive may not enforce different regulations. . . .

Capps, 204 F.2d at 659-660.

Here, Petitioner contends that its state hazardous waste statutes have been authorized by Congress through RCRA and as such, should have the same standing and

force as a federal statute. Louisiana's situation is more analogous to *Capps* than to *Belmont* or *Pink* because *Capps* involved a Congressional act. *Belmont* and *Pink* did not involve state law, but only state public policy formulated by state courts.

In the present case, the trial court, affirmed by the U.S. Fifth Circuit, found Louisiana's questioned statutes unconstitutional intrusions on the dormant Commerce Clause. Therefore, there was no need for either of these courts to consider the effect of the Agreement or the Annex on La. R.S. 30:2190 and 2191.

The trial court noted that the Louisiana statutes failed to consider any "treaties or executive agreements which pertain to the importation of hazardous wastes from foreign countries." A25. Also, the trial court acknowledged that it is not necessary to discuss or resolve the issue of whether La. R.S. 30:2190 and 2191 are in conflict with the U.S.-Mexican Agreement and Annex III because the statutes are unconstitutional under the Commerce Clause. A25. The Court has never addressed the situation which Louisiana now faces, that is, the effect of an executive agreement on Congressionally authorized state law. Therefore, this Court should grant the writ to determine if the Agreement and Annex III to the Agreement alter the constitutionality of RCRA-authorized Louisiana statutes, La. R.S. 30:2190 and 2191.

CONCLUSION

Consideration of this case affords the Court an opportunity to send a message: the mandate from RCRA shall be followed. Environmental responsibility and

accountability extend from "cradle to grave."[30] Hazardous waste generated in and regulated by a foreign nation must be treated, stored, and disposed within that nation's own confines. No government should inflict upon its people the hazardous waste of another.

In deciding whether the Court grants this writ, consider,

> Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.[31]

A Writ of Certiorari should issue.

Respectfully submitted,

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[30] *See supra* note 20.

[31] An excerpt attributed to Chief Seattle's response in 1854 to President Franklin Pierce. President Pierce had offered to purchase Indian land and promised a reservation for the Indian people.

CHEMICAL WASTE MANAGEMENT, INC.,
Plaintiff-Appellee,

v.

Paul H. TEMPLET, Ph.D., Secretary of the Louisiana Department of Environmental Quality, Defendant-Appellant.

No. 91-3693
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 10, 1992.

Operator of hazardous waste disposal facility filed action against Secretary of Louisiana Department of Environmental Quality to challenge constitutionality of statutory prohibition against importation, storage, treatment, and disposal of hazardous waste generated in foreign nations. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., 770 F.Supp. 1142, found statutes to be unconstitutional. Secretary appealed. The Court of Appeals, Reavley, Circuit Judge, held that Louisiana's statutory prohibition against importation, storage, treatment, and disposal of hazardous waste generated in foreign nations violated dormant commerce power.

Affirmed.

Meredith H. Lieux, Louisiana Dept. of Environmental Quality and John King, Dept. of Environmental Quality, Office of Legal Affairs, Baton Rouge, La., for defendant-appellant.

Gerald L. Walter and Anne J. Crochet, Baton Rouge, La., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Louisiana.

Before REAVLEY, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:

Louisiana prohibits the importation, storage, treatment, and disposal on Louisiana soil of hazardous wastes that are generated in foreign nations. LA.REV.STAT.ANN. §§ 30:2190-91 (West 1989). The district court declared that these statutes are unconstitutional intrusions on Congress' dormant commerce power. *Chemical Waste Management, Inc. v. Templet*, 770 F.Supp. 1142, 1153 (M.D.La.1991). The Supreme Court recently held that the Commerce Clause prohibits Alabama from exacting a greater hazardous-waste-disposal tax for hazardous materials generated outside Alabama than it does for those generated in-state despite *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986), and the quarantine cases cited by appellant Louisiana in its appeal of this case. *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, ___, 112 S.Ct. 2009, 2016-17, 119 L.Ed.2d 121 (1992). So we must affirm the district court's decision unless Louisiana presents an argument that was inapplicable to *Hunt's* facts and prevents operation of the dormant Commerce Clause.

Louisiana argues that Congress, through the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (RCRA), and the Environmental Protection Agency, authorized Louisiana's entire hazardous waste

program as a satisfactory replacement for the federal minimum standards, thus rendering the challenged statutes an exercise of Congress' commerce power rather than an affront to it. But we may only find that Congress has permitted states to legislate in derogation of interstate commerce upon an "unmistakably clear . . . expression of approval by Congress." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92, 104 S.Ct. 2237, 2242-43, 81 L.Ed.2d 71 (1984). The Fourth Circuit has held that South Carolina failed to present evidence "indicat[ing] an unmistakably clear congressional intent to permit states to burden interstate commerce" in the RCRA. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 792 (4th Cir.1991). Nor does Louisiana present any such evidence in this case. In fact, the RCRA could be read to *prohibit* state hazardous-waste legislation that burdens interstate commerce. *See* RCRA, 42 U.S.C. § 6926(b) (state hazardous-waste programs must be "consistent with the Federal or State programs applicable in other States"); H.R.REP. No. 1491, 94th Cong., 2d Sess. 30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6268 ("general purpose of having federal minimum standards for hazardous waste disposal, with the option of state implementation of state programs equivalent to the federal program, is (1) it provides uniformity among the states as to how hazardous wastes are regulated . . . ").

AFFIRMED.

CHEMICAL WASTE MANAGEMENT, INC.

v.

Paul H. TEMPLET, Ph.D., Secretary of the Louisiana Department of Environmental Quality.

Civ. A. No. 89-761-B.

United States District Court,
M.D. Louisiana.

July 9, 1991.

The operator of a hazardous waste disposal facility filed an action against the Secretary of the Louisiana Department of Environmental Quality, challenging the constitutionality of Louisiana statutes governing the importation, storage and disposal of foreign generated hazardous waste. The District Court, Polozola, J., held that Louisiana statutes prohibiting state authorized treatment, storage and disposal facility from receiving hazardous waste generated in Mexico by "maquiladoras" companies were unconstitutional and invalid under interstate and foreign commerce clauses of the United States Constitution.

So ordered.

Gerald L. Walter, Anne J. Crochet, Baton Rouge, La., for plaintiff.

John B. King, Ann Coco, Office of Legal Affairs and Enforcement, Dept. of Environmental Quality, Baton Rouge, La., for defendant.

OPINION

POLOZOLA, District Judge.

This case requires the Court to determine whether Louisiana's ban on the importation of hazardous waste from foreign countries violates the United States Constitution.

Chemical Waste Management, Inc. (Chem Waste) has filed this action seeking declaratory relief against the defendant, Paul H. Templet, Ph.D., Secretary of the Louisiana Department of Environmental Quality (LDEQ),[1] challenging the constitutionality of Louisiana Revised Statutes (La. R.S.) 30:2190 and 30:2191, which govern the importation, storage, and disposal of hazardous waste in the State of Louisiana that is generated in foreign countries.[2] The issue the Court must decide is whether the State of Louisiana can prohibit a state-authorized treatment, storage, and disposal facility from receiving hazardous waste generated in Mexico by "maquiladoras" companies.[3] In reasons which follow, the Court finds that

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[1] Originally, Chem Waste asked for both injunctive relief and a declaratory judgment. The LDEQ counterclaimed seeking to enjoin Chem Waste from receiving any foreign hazardous waste. In accordance with a Stipulation, Chem Waste agreed not to receive any foreign hazardous waste during the pendency of this suit and both parties withdrew their requests for injunctive relief.

[2] The Court has subject matter jurisdiction under 28 U.S.C. § 1332 and venue is proper under 28 U.S.C. § 1391.

[3] "Maquiladoras" are companies incorporated under Mexican corporate law which may be 100% foreign owned and/or managed. The corporation is allowed to import its raw materials and other items into Mexico without paying Mexican import

La.R.S. 30:2190 and 30:2191 are unconstitutional and invalid under the Commerce Clause of the United States Constitution.

I. BACKGROUND

The facts involved in this case are not seriously disputed by the parties. ChemWaste owns and operates an LDEQ authorized hazardous waste treatment, storage, and disposal facility in Carlyss, Louisiana (Carlyss).[4]

On September 22, 1989, and September 28, 1989, ChemWaste informed the Regional Administrator of the United States Environmental Protection Agency (EPA), in Dallas, Texas, of its intent to receive foreign hazardous waste generated from Inland System Business Unit of Inland/Matamores, Mexico (Inland), and Trico Technologies of Matamores, Mexico (Trico), two maquiladoras companies, at the Carlyss facility.[5] ChemWaste advised the EPA that the foreign hazardous waste being shipped to the United States was waste which the maquiladoras companies were mandated to return to the United States

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taxes. *See* Rose, Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras, 23 Int'l Law. 223, 223-26 (1989).

[4] A company seeking to operate a hazardous waste treatment, storage, or disposal facility in Louisiana must obtain authorization from the LDEQ.

[5] 40 CFR 264.12(a) requires that the EPA Regional Administrator be notified in writing by the owner of a facility that has arranged to receive hazardous waste from a foreign source at least four weeks before the date the waste is expected to arrive at the facility.

by Annex III of the "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" (U.S.-Mexican Agreement).[6] Annex III provides:

> Hazardous waste generated in the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporary admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations.[7]

The EPA advised ChemWaste that, since the State of Louisiana was an "authorized" state under the Recovery [sic] Conservation and Recovery Act (RCRA), the State of

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[6] TIAS 10827; 19 Weekly Comp.Pres.Doc. 1137 (Aug. 14, 1984) [hereinafter U.S.-Mexican Agreement]. The Agreement is an "executive agreement" consummated by the President of the United States without the United States Senate's confirmation. *U.S. v. Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). The Agreement was signed on August 14, 1983, by President Ronald Reagan, for the United States of America, and President Miguel de la Madrid Hurtado, for Mexico. *See* Recent Developments, 25 Harv. Int'l L.J. 195, 239 (1984); Note, The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problem of the Borderlands, 19 Corn. Int'l L.J. 87, 122 (1986). Annex III to the Agreement. "Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances" [hereinafter Annex III], was executed on November 12, 1986, by representatives of each country's executive branch, in accordance with Articles 3 and 22 of the U.S.-Mexican Agreement. *See* Rose, *supra* note 3, at 240-42.

[7] Annex III, art. XI, *supra* note 6.

Louisiana and not the EPA was the proper party to be notified regarding the receipt of hazardous waste from Mexico.[8] Relying on La.R.S. 30:2190 and 30:2191, the LDEQ objected to ChemWaste's importation, storage, and disposal of the Mexican foreign hazardous waste in Louisiana and refused to grant the plaintiff a permit.

ChemWaste filed this suit challenging the constitutionality of the Louisiana statutes on the grounds that the Louisiana statutes are inconsistent with the federal statutory provisions under RCRA and violate both the Commerce Clause and the Supremacy Clause of the United States Constitution.

II. LOUISIANA'S FOREIGN GENERATED HAZARDOUS WASTE LAWS AND THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976

To fully understand the legal issues involved in this case, it is necessary to compare the Louisiana statutes with RCRA.

La.R.S. 30:2190[9] is entitled "Hazardous wastes from foreign nations; findings; prohibitions" and provides:

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[8] Pub.L. No. 89-272, Tit. II, § 1002, 90 Stat. 2795 (1976), codified at 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp.1991); 42 U.S.C.A. § 6926 (West 1983 & Supp.1991); 40 CFR §§ 123.1-123.64 & 271.1-271.138.

[9] Added by 1983 La.Acts No. 694, § 1, effective July 21, 1983, and amended by 1984 La.Acts No. 826, § 1, and 1987 La.Acts No. 506, § 1.

A. The legislature finds and declares that:

(1) The laws of the United States require testing, manifesting, and safe transportation of hazardous wastes to insure proper identification and handling from generation to ultimate disposal. These laws are not applicable to hazardous wastes generated in foreign nations until such wastes are actually in this country.

(2) The laws of foreign nations are inadequate to insure that hazardous wastes sought to be exported to the United States do not contain unknown or unauthorized pollutants and that such wastes are not released into the environment due to inadequate containment, labeling, or handling during transport.

(3) The only practical method for insuring that the environment and the health of the citizens of this state are not endangered by the importation of hazardous wastes generated in foreign nations is to prohibit the introduction or receipt of such wastes into this state for the purpose of treatment, storage, or disposal.

B. It shall be unlawful for any person to transport or cause or allow to be transported into this state, for the purpose of treatment, storage, or disposal, any hazardous waste generated outside the United States and its territories.

C. It shall be unlawful for any person to receive for treatment, storage, or disposal in this state any hazardous waste generated outside the United States and its territories.

D. This Section shall not apply to any hazardous waste generated outside of the United States and its territories which must be disposed of in accordance with the provisions of Public Law

> 96-478 adopted by the United States Congress and known as the Act to Prevent Pollution from Ships [33 U.S.C. § 1901 *et seq.*]. This Section shall only apply to hazardous waste which is imported into this state directly from a foreign nation.
>
> E. Notwithstanding any other provisions of law, the importation of spent petroleum catalysts from foreign countries for purposes of recycling utilizing processes which produce no hazardous wastes, is not prohibited.

La.R.S. 30:2191[10] is entitled "Importation of hazardous waste from foreign countries; prohibition" and states:

> A. The commission or the assistant secretary shall deny hazardous waste transporter licenses and hazardous waste treatment, storage, and disposal facility permits to all persons who propose to treatment [sic] into and dispose of in Louisiana hazardous waste generated in a country other than the United States.
>
> B. The provisions of the Section shall not apply to the disposal or storage of any hazardous or solid waste which must be disposed of according to the provisions of Public Law 96-478, adopted by the United States Congress and known as the Marine Pollution Protocol Law [33 U.S.C. § 1901 *et seq.*].
>
> C. The Commission shall revoke the permit of any permitted hazardous waste facility which hereafter disposed of hazardous waste generated in a country other than the United States. This power shall be in addition to other powers

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[10] Added by 1983 La.Acts No. 260 § 1, effective June 30, 1983, and amended by 1987 La.Acts No. 506 § 1.

> and remedies available to the Commission under this subtitle.
>
> D. The provisions of this Section shall not apply to spent petroleum catalysts from foreign countries imported for purposes of recycling utilizing processes which produce no hazardous wastes.

The LDEQ contends that the above statutes are valid and constitutional because the EPA reviewed and approved Louisiana's environmental laws, and designated the State of Louisiana as an "authorized" state in accordance with RCRA.

The Congress enacted RCRA to be a "cradle-to-grave" regulatory program which established "minimum standards for the generation, treatment, storage, and disposal of hazardous waste."[11] It is also clear that the Congress did not intend to preempt all state environmental laws when it enacted RCRA. The legislative history of RCRA provides that "the states are given, if they chose, the authority to establish and implement a state program in lieu of a federal program, if such a program is equivalent to the federal program."[12] In order for the states to implement such a program, RCRA provides a method for a state to have its hazardous waste program authorized

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[11] Legislative History of House Comm. on Resource Conservation and Recovery Act of 1976, H.R.Rep. No. 94-1491, Pt. I, 94th Cong., 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Admin. News. 6238, 6244 [hereinafter Legislative History]; *National Solid Wastes Management Assoc. v. Alabama, Dept. of Envtl. Management*, 910 F.2d 713, 722 (11th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2800, 115 L.Ed.2d 973 (1991).

[12] Legislative History, *supra* note 11, at 6244.

by the EPA to operate in lieu of the minimum standards of the federal program.[13] This procedure requires a state to submit its program to the EPA for review and a public hearing.[14] In order for a state to establish and implement a program in lieu of the federal program, the state program cannot deviate below RCRA's minimum standards *and* the state program must not be inconsistent "with Federal or State programs applicable in other States."[15] States are not precluded from "adopting or enforcing requirements which are more stringent or more extensive" or "operating a program with greater scope of coverage" than required by the minimum federal standards.[16] However, the state's approved program must operate in accordance with the federal requirements to remain authorized.[17]

The State of Louisiana followed the above procedures when it applied for interim authorization from the EPA to operate its hazardous waste program in lieu of the federal program on December 19, 1980, and January 24, 1984. The EPA granted Louisiana final authorization for its program on January 24, 1985. ChemWaste acknowledges that Louisiana is an authorized state under RCRA. However, ChemWaste contends that La.R.S. 30:2190 and 30:2191 are inconsistent with federal programs and, therefore, cannot operate in lieu of the federal RCRA program.[18] In

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[13] 42 U.S.C.A. § 6926(b) (West Supp.1991); 40 CFR § 123.

[14] *Id.*

[15] *Id.* § 6926(b).

[16] 40 CFR § 123.1(i).

[17] *Id.* § 123.1.

[18] *See* 42 U.S.C.A. § 6926(b) (West Supp.1991).

response to ChemWaste's arguments, the LDEQ contends that the statutes were enacted[19] into law prior to the time the State of Louisiana received its authorized status from the EPA. Therefore, the LDEQ argues that the EPA approved the use of §§ 2190 and 2191 when it approved Louisiana as an authorized state.[20] The LDEQ further argues that §§ 2190 and 2191 were reviewed and approved by the EPA to operate in lieu of the federal statutes and, therefore, are valid and constitutional.

It is not necessary for the Court to determine whether the Louisiana statutes are consistent with RCRA because the Court finds that, regardless of whether or not the statutes are valid and effective under RCRA, §§ 2190 and 2191 are unconstitutional under the Commerce Clause of the United States Constitution.[21]

III. LA.R.S. 30:2190 AND 30:2191 VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Commerce Clause of the United States Constitution grants to the Congress the power and authority "to regulate Commerce with foreign Nations, and among the

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[19] La.R.S. 30:2190-2191 (West 1989) were effective on July 31, 1983 and June 30, 1983, respectively; *see supra* notes 9-10.

[20] RCRA allows an authorized state to provide more stringent, yet consistent, environmental laws than those provided under the federal program.

[21] U.S. Const. art. I, § 8, cl. 3.

several States, and with the Indian Tribes."[22] The Congress has the authority and power to regulate both interstate and foreign commerce. Even where the Congress has failed to pass legislation to regulate interstate or foreign commerce, the states are limited in their ability to discriminate or place barriers against interstate and foreign commerce.[23] ChemWaste contends the statutes present an unconstitutional burden on both interstate and foreign commerce. The Court agrees that §§ 2190 and 2191 place an unconstitutional burden on interstate commerce.

A. The Interstate Commerce Clause of the United States Constitution Under the Facts of this Case.

The Commerce Clause is not implicated unless the object is subject to constitutional protection. The United States Supreme Court has set forth certain guidelines which must be followed to resolve the issues in this case.

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[22] *Id.*

[23] *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 325 n. 1, 109 S.Ct. 2491, 2493 n. 1, 105 L.Ed.2d 275 (1989); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 273-74, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35-36, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978); *New Orleans S.S. Assoc. v. Plaquemines Port*, 874 F.2d 1018, 1022 (5th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2172, 109 L.Ed.2d 502 (1990); *Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1442-43 (5th Cir.1988); *Tenneco, Inc. v. Sutton*, 530 F.Supp. 411, 439 (M.D.La.1981).

Thus, it is clear that "[a]ll objects of interstate trade merit protection; none is excluded by definition at the outset."[24] A state may prohibit transportation of an object across state lines when "the article's worth in interstate commerce [is] far outweighed by the dangers inhering in their very movement."[25] Where the movement of non-hazardous waste is involved, the Supreme Court has held that "[j]ust as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement."[26]

Certain objects "are not legitimate subjects of trade and commerce."[27] Such objects are those objects which in their existing condition at the time of transport could not be safely brought into the state without the risk of the "spread [of] disease, pestilence, and death."[28] It could be argued that certain hazardous waste fit into this category. However, in *National Solid Wastes Management Assoc. v. Alabama Department of Environmental Management*, the Eleventh Circuit, relying on the Supreme Court's decision in *City of Philadelphia v. New Jersey*, held that hazardous

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[24] *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622, 98 S.Ct. 2531, 2534, 57 L.Ed.2d 475 (1978).

[25] *Id.*

[26] *Id.* at 622-23, 98 S.Ct. at 2535.

[27] *Id.* at 622, 98 S.Ct. at 2534 (quoting *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465, 489, 8 S.Ct. 689, 700, 31 L.Ed. 700 (1888)).

[28] *Id.*

waste is an object of commerce and subject to the Commerce Clause.[29] The Eleventh Circuit reasoned:

> Although the hazardous waste involved in this case may be innately more dangerous than the solid or liquid waste involved in *City of Philadelphia*, we cannot say that the dangers of hazardous waste outweighs worth in interstate commerce. Congress has defined hazardous waste as "a solid waste . . . which . . . may . . . cause, or significantly contribute to a significant increase in mortality or an increase in serious . . . illness, or . . . pose a substantial present or potential hazard to human health or the environment when *improperly* treated, stored, transported, or disposed of, or otherwise managed." The legislature and executive branches of the federal government together with the separate states have developed a comprehensive scheme from regulating hazardous waste. . . . To the extent these rules can and do provide for the safe transportation of hazardous waste, the dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines.[30]

While the waste considered in the above case was generated within the United States, the Court believes that the same principles and reasoning apply to the foreign generated hazardous waste involved in this case.

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[29] 910 F.2d 713, 719 (11th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2800, 115 L.Ed.2d 973 (1991). *See Alabama v. United States EPA*, 871 F.2d 1548, 1555 n. 3 (11th Cir.), *cert. denied sub nom., Alabama ex rel. Siegleman v. United States EPA*, ___ U.S. ___, 110 S.Ct. 538, 107 L.Ed.2d 535 (1989).

[30] 910 F.2d at 719 (emphasis in original).

The court's conclusion is reinforced by the fact that the same type of hazardous waste is already being transported into and disposed of in Louisiana.

The hazardous waste which the LDEQ seeks to prohibit from being stored or disposed of in Louisiana consists of paint solvents used in spray painting of automobile windshield wiper blades (Trico) and automobile dash boards and other interior automotive parts (Inland). The hazardous waste involved in this case is not the type that, in its existing condition, would spread disease by its mere transportation into the State of Louisiana. Although the hazardous waste which the plaintiff seeks to dispose of in Louisiana is generated in Mexico, the Carlyss facility is already receiving the same type of hazardous waste from plants located *within* the United States. The only difference between the Mexican and United States waste is that Mexican water is used in Mexico while American water is used in the United States. Therefore, the Court finds that the foreign generated hazardous waste involved in this case is an object of commerce and subject to the protection of the Commerce Clause of the United States Constitution.

Louisiana law makes it unlawful for any person to transport into the state "for the purposes of treatment, storage, or disposal *any hazardous waste generated outside the United States and its territories.*"[31] The LDEQ commission or the assistant secretary must "deny hazardous

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[31] La.R.S. 30:2190(B) (West 1989) (emphasis added).

waste transporter licenses and hazardous waste treatment, storage, and disposal facility permits" to any person desiring to transport and/or dispose of foreign hazardous waste in Louisiana.[32] If a LDEQ permitted facility, such as the ChemWaste facility at Carlyss, disposes of foreign hazardous waste, the LDEQ commission is required to revoke its permit.[33] The plain language of La.R.S. 30:2190 and 30:2191 clearly provides that the State of Louisiana is restricting the movement, storage, and disposal of foreign hazardous waste in Louisiana. Because the Court has found that the foreign hazardous waste involved in this case is an object of commerce, the Louisiana statutes which prohibit its transportation, storage, or disposal in Louisiana are subject to "constitutional scrutiny."[34]

The Court must now determine whether Louisiana's prohibition against foreign generated hazardous waste is permissible under the Commerce Clause.[35] In making this determination, the Court shall apply the test set forth by the Supreme Court in *City of Philadelphia*, which provides:

> [W]here simple economic protectionism is effected by the state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a

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[32] *Id.* § 2191(A).

[33] *Id.* § 2191(C).

[34] *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23, 98 S.Ct. 2531, 2435, 57 L.Ed.2d 475 (1978); *National Solid Wastes*, 910 F.2d at 719.

[35] *National Solid Wastes*, 910 F.2d at 719; *Tenneco, Inc. v. Sutton*, 530 F.Supp. 411, 438-39 (M.D.La.1981).

> State's borders. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.* [397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)][36]

Therefore, the Court must determine whether §§ 2190 and 2191 are "basically a protectionist measure, or whether [they are] based on legitimate local concerns with effects on interstate commerce that are only incidental."[37]

The LDEQ advances several arguments in support of its contention that §§ 2190 and 2191 are constitutional. The LDEQ contends that the purpose of the ban is to protect the citizens of Louisiana from possible health hazards that may arise from contact with unknown contaminants in the foreign generated hazardous waste and thus is valid under the health and safety quarantine power of the state. To support this argument, LDEQ introduced evidence in an attempt to establish: (1) the foreign generator is not subject to the same laws and controls as generators operating in the United States; (2) the Mexican environmental laws have not been sufficiently developed from a technical standpoint to ensure that the type of waste stated on the manifest[38] is actually

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[36] 437 U.S. at 624, 98 S.Ct. at 2531 (citations omitted); *National Solid Wastes*, 910 F.2d at 719-20. *See also Tenneco*, 530 F.Supp. at 439.

[37] *National Solid Wastes*, 910 F.2d at 720; *see City of Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2536.

[38] The "manifest" is a required form which identifies the quantity, composition, and the origin, routing, and destination

what is being imported into the state; (3) the Secretariat of Urban Development and Ecology (SUDUE), the Mexican counter part of the EPA, is inadequately staffed to enforce the Mexican environmental laws; and (4) there is no less discriminatory method available.[39]

In response to LDEQ's contention, ChemWaste argues that the Mexican laws are sufficient to ensure the waste generated in Mexico will not cause health hazards in Louisiana. However, ChemWaste contends that the sufficiency of the Mexican laws is irrelevant because the maquiladoras companies and the Carlyss facility must comply with the United States environmental laws. The Court agrees. Although a major portion of the testimony and evidence presented at the trial concerned the adequacy or inadequacy of the Mexican environmental laws, the Court believes that actual language used in the Louisiana statutes is the core of the constitutional issue now pending before the Court. The statutes enacted by the Louisiana legislature create an irrebuttable presumption concerning the sufficiency of other nation's environmental laws. The irrebuttable presumption leads to a prohibition based solely on the origin of the hazardous waste. An analysis of § 2190 supports this conclusion.

The Louisiana legislature first presumes that foreign nation environmental laws "are inadequate to insure that hazardous wastes sought to be exported to the United

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of hazardous waste during its transportation from the point of generation to the point of off-site disposal, treatment, or storage.

[39] *See Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

States do not contain unknown or unauthorized pollutants and that such wastes are not released into the environment due to inadequate containment, labeling, or handling during transport."[40] Based on this presumption, the legislature concludes that "[t]he only practical method for insuring that the environment and the health of the citizens of this state are not endangered by the importation of hazardous wastes generated in foreign nations is to prohibit the introduction or receipt of such wastes into this state for the purpose of treatment, storage, or disposal."[41]

In an apparent attempt to limit scope and constitutional impact of the prohibitions set forth in § 2190, the Louisiana legislature only restricted foreign hazardous waste "imported into this state *directly* from a foreign nation."[42] This restriction has caused much confusion because of the legal and factual dispute regarding the phrase "directly from another nation." The LDEQ contends that by limiting the restriction to hazardous waste imported directly from another nation, there is no unconstitutional burden on interstate commerce under the Commerce Clause. This so called distinction between "direct" and indirect importation of hazardous waste does not cure the impermissible burden the statute places on interstate commerce.

A review of the evidence presented in this case clearly shows that the effect of the statute was to restrict

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[40] La.R.S. 30:2190(A)(2) (West 1989).

[41] *Id.* § 2190(A)(3).

[42] *Id.* § 2190(D) (emphasis added).

the flow of commerce from Texas to Louisiana. The Court must note that 40 CFR 271.7 requires that when a state seeks [sic] have its environmental program operate in lieu of the federal program, e.g., become an "authorized" state, the attorney general of that state must certify to the EPA that the state program is consistent with the federal program. In the certification opinion to the EPA, the Louisiana Attorney General addressed the EPA's concern as to the proper interpretation of the term "directly." The Louisiana Attorney General opined[43] that the restriction only applied to hazardous waste imported directly into Louisiana from a foreign country. He also concluded it was not direct if the waste traveled through another state.[44] Under this interpretation, the LDEQ has misapplied the statutes, causing them to be unconstitutional "as applied."

The federal RCRA program allows the importation of foreign hazardous waste.[45] Consequently, foreign generated hazardous waste is legally imported to other states of the United States. The importer of the foreign generated hazardous waste must not only satisfy the federal requirements, but once the waste is legally in the United

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[43] Usually, the Louisiana Attorney General represents and defends the State of Louisiana when the constitutionality of its laws are being challenged. The Attorney General of Louisiana declined to represent the state in this case even though the constitutionality of La.R.S. 30:2190 and 30:2191 (West 1989) is in question.

[44] *See* Letter dated Aug. 21, 1984, from Attorney General William J. Guste, Jr. to the EPA, Exhibit 11 of the *Stipulations* (Document 15 in the record).

[45] 40 CFR 262.60.

States, the transporter and disposer are subject to the same environmental laws that are applicable to domestic generated hazardous waste.[46] Therefore, when Louisiana prohibits waste transported from Mexico to Louisiana through Texas, it implicates interstate commerce because the Texas environmental laws concerning transportation apply whether the waste is properly categorized as "directly" or "indirectly" imported.

In further support for the Louisiana statutes, LDEQ relies on the "quarantine power" defense. The Eleventh Circuit has recently considered and rejected a similar defense in *National Solid Wastes Management Assoc. v. Alabama Department of Environmental Management*.[47] In *National Solid Wastes*, the Alabama legislature enacted a law which prevented commercial waste management facilities from accepting hazardous waste which was generated in other states unless certain state statutory regulations were met and either preapproval be granted by the State of Alabama, or the waste be pretreated. Alabama argued that the objective of its legislation was to protect the health of its citizens and its environment, not to discriminate against waste generated in other states. However, the Eleventh Circuit, noting that the Alabama law did not prohibit shipments of all hazardous waste but only waste that came from other states, held the statute unconstitutional, stating:

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[46] Arguably, if the hazardous waste is of the same type, at this point any distinction between its origin, foreign or domestic, is blurred as the same laws apply.

[47] 910 F.2d 713 (11th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2800, 115 L.Ed.2d 973 (1991).

> "[T]he evil of protectionism can reside in legislative means as with as legislative ends." *City of Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2536-37. Even if Alabama's purpose . . . was to protect human health and the environment in Alabama, that purpose "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27, 98 S.Ct. at 2537.[48]

In very specific terms, the Eleventh Circuit, relying on *City of Philadelphia*, found that the Alabama law was discriminatory on its face and a protectionist measure because the statute was based solely on the origin of the waste.

In an attempt to circumvent the clear language and mandate of the United States Supreme Court in the *City of Philadelphia* case and to distinguish the holding by the Eleventh Circuit in the Alabama case discussed above, the LDEQ contends that the Louisiana statutes do not ban waste because of its origin, but on the lack of adequate controls by foreign nations.

The problem with LDEQ's argument is that Louisiana's ban is based on the origin of the hazardous waste, rather than on the specific type of hazardous waste. The Louisiana legislature did not provide any exceptions to the absolute ban of foreign generated hazardous waste. The LDEQ was given no authority to consider such factors as the type of waste generated, the foreign country from which the waste originated, or the environmental

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[48] *Id.* at 720-21.

laws of the foreign country involved and whether such laws were adequate or enforced. The Louisiana laws also fail to give the LDEQ the authority to consider whether the transporter and the in-state facility are subject to enforceable environmental standards, regardless of the generation point of the hazardous waste. Finally, the Louisiana statutes fail to take into consideration any treaties or executive agreements which pertain to the importation of hazardous waste from foreign countries. Simply put, Louisiana's prohibition or barrier is based solely on the fact that the origin of the hazardous waste is from a foreign country.

Although the hazardous waste involved in this case was generated in a foreign country, the Court believes that the legal principals discussed earlier involving domestic waste also apply when a state limits movement based on the origin of the hazardous waste even if the origin is a foreign country. The Court finds that La.R.S. 30:2190 and 30:2191 provide for an absolute ban or prohibition against an object of commerce based solely on its origin. Therefore, the Court finds that §§ 2190 and 2191 are discriminatory on their face, or *per se* discriminatory. Furthermore, the Court finds as a matter of fact and law that the "quarantine power" exception does not apply under the facts of this case.

B. Foreign Commerce Clause.

ChemWaste also contends the provisions of La.R.S. 30:2190 and 30:2191 violate the foreign commerce

clause.[49] The Congress's [sic] plenary power to regulate foreign commerce is well established.[50] The Supreme Court has noted that a higher level of scrutiny is required when foreign commerce is restrained, because, unlike interstate commerce, the United States must speak with a single voice for effective relations and trade with foreign nations.[51] Thus, "[f]oreign commerce is pre-eminently a matter of national concern."[52] Although the Congress's [sic] regulatory power over interstate commerce may be limited by federalism and state sovereignty, the Supreme Court has not held that such limitations apply to the Congress's [sic] power to regulate foreign commerce.[53]

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[49] U.S. Const. art. I, § 8, cl. 3.

[50] *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025 (1933); *Welch v. State Dept. of Highways & Pub. Transp.*, 780 F.2d 1268 (5th Cir.1986), *aff'd*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987); *Meserey v. United States*, 447 F.Supp. 548 (D.Nev.1977).

[51] *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96, 104 S.Ct. 2237, 2245, 81 L.Ed.2d 71 (1984); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n. 9, 100 S.Ct. 2271, 2278 n. 9, 65 L.Ed.2d 244 (1980); *Louisiana Land & Exploration v. Pilot Petroleum Corp.*, 900 F.2d 816, 821 (5th Cir.), *cert. denied sub nom., Alabama Dept. of Revenue v. Pilot Petroleum Corp.*, ___ U.S. ___, 111 S.Ct. 248, 112 L.Ed.2d 207 (1990); *New Orleans S.S. Assoc. v. Plaquemines Port*, 874 F.2d 1018, 1022-23 (5th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2172, 109 L.Ed.2d 502 (1990).

[52] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 99 S.Ct. 1813, 1821, 60 L.Ed.2d 336 (1979). The Supreme Court noted that "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater [than the other grants of power under the Commerce Clause]." *Id.*

[53] *Id.* at 448 n. 13, 99 S.Ct. at 1821 n. 13.

The Congress has expressly authorized in the RCRA regulations the importation of foreign hazardous waste.[54] The State of Louisiana contends that it can prohibit the importation of foreign hazardous waste because the EPA authorized the state to use its program in lieu of the federal provisions. While the state's program has been authorized under the RCRA scheme, the approval by the EPA does not constitute a declaration that the state's program is constitutional or that such approval is binding on the courts or precludes the courts from determining the constitutionality of the statutes. In accordance with the separation of powers doctrine mandated by the Constitution, it is for the courts, and not an executive or legislative body, to determine the constitutionality of the statutes involved in this case.

After reviewing the language of the Louisiana statutes in accordance with the mandates set forth by the Supreme Court, the Court finds that the restrictions placed on the importation of foreign generated hazardous waste, based solely on the origin of an object of commerce, violates the foreign Commerce Clause of the United States Constitution. Thus, since §§ 2190 and 2191 violate the foreign commerce clause, each is unconstitutional.[55]

The Court finds the restrictions created by §§ 2190 and 2191 constitute economic protectionism. Thus, these

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[54] 40 CFR 262.

[55] ChemWaste also contends that §§ 2190 and 2191 are in conflict with the U.S.-Mexican Agreement and Annex III and thus are unconstitutional under the Supremacy Clause. U.S. Const. art. VI, cl. 2. Having found the statutes are unconstitutional under the Commerce Clause, it is not necessary for the Court to discuss or resolve this issue.

statutes are discriminatory on their face, or *per se* discriminatory, in violation of the Interstate and Foreign Commerce Clauses of the United States Constitution. The LDEQ has failed to present a legitimate local concern sufficient to overcome the unconstitutional barrier created by the State of Louisiana when it enacted §§ 2190 and 2191.

THEREFORE, for the reasons set forth above:[56]

IT IS ORDERED that Louisiana Revised Statutes 30:2190 and 30:2191 be and each is hereby declared unconstitutional.

IT IS FURTHER ORDERED that a permanent injunction be and it is hereby issued permanently enjoining the defendant, Paul H. Templet, Ph.D., Secretary of the Louisiana Department of Environmental Quality, his successors, agents, and employees, from administering and enforcing Louisiana Revised Statutes 30:2190 and 30:2191.

IT IS FURTHER ORDERED that a copy of the Court's judgment shall be served forthwith on Charles "Buddy" Roemer, Governor of Louisiana, William J. Guste, Jr., Attorney General of Louisiana, and Paul H. Templet, Ph.D., Secretary of the Louisiana Department of Environmental Quality, by the United States Marshal.

Judgment shall be entered accordingly.

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[56] The Court has considered all of the arguments and contentions of the parties whether specifically discussed in the opinion or not.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3693

CHEMICAL WASTE MANAGEMENT, INC.,
Plaintiff-Appellee,

versus

PAUL H. TEMPLET, PH.D., Secretary of the Louisiana Department of Environmental Quality,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(September 2, 1992)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Norman M. Reavley
United States
Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

§ 2190. Hazardous wastes from foreign nations; findings; prohibitions

A. The legislature finds and declares that:

(1) The laws of the United States require testing, manifesting, and safe transportation of hazardous wastes to insure proper identification and handling from generation to ultimate disposal. These laws are not applicable to hazardous wastes generated in foreign nations until such wastes are actually in this country.

(2) The laws of foreign nations are inadequate to insure that hazardous wastes sought to be exported to the United States do not contain unknown or unauthorized pollutants and that such wastes are not released into the environment due to inadequate containment, labeling, or handling during transport.

(3) The only practical method for insuring that the environment and the health of the citizens of this state are not endangered by the importation of hazardous wastes generated in foreign nations is to prohibit the introduction or receipt of such wastes into this state for the purpose of treatment, storage, or disposal.

B. It shall be unlawful for any person to transport or cause or allow to be transported into this state, for the purpose of treatment, storage, or disposal, any hazardous waste generated outside the United States and its territories.

C. It shall be unlawful for any person to receive for treatment, storage, or disposal in this state any hazardous waste generated outside the United States or its territories.

D. This Section shall not apply to any hazardous waste generated outside of the United States and its territories which must be disposed of in accordance with the provisions of Public Law 96-478 adopted by the United States Congress and known as the Act to Prevent Pollution from Ships.[1] This Section shall only apply to hazardous waste which is imported into this state directly from a foreign nation.

E. Notwithstanding any other provision of law, the importation of spent petroleum catalysts from foreign countries for purposes of recycling utilizing processes which produce no hazardous wastes, is not prohibited.

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§ 2191. Importation of hazardous waste from foreign countries; prohibition

A. The commission or the assistant secretary shall deny hazardous waste transporter licenses and hazardous waste treatment, storage, and disposal facility permits to all persons who propose to transport into and dispose of in Louisiana hazardous waste generated in a country other than the United States.

B. The provisions of this Section shall not apply to the disposal or storage of any hazardous or solid waste which must be disposed of according to the provisions of Public Law 96-478, adopted by the United States Congress and known as the Marine Pollution Protocol Law.[1]

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[1] 33 U.S.C.A. § 1901 et seq.

[1] See, inter alia, 33 U.S.C.A. § 1901 et seq.

C. The commission shall revoke the permit of any permitted hazardous waste facility which hereafter disposes of hazardous waste generated in a country other than the United States. This power shall be in addition to other powers and remedies available to the Commission under this Subtitle.

D. The provisions of this Section shall not apply to spent petroleum catalysts from foreign countries imported for purposes of recycling utilizing processes which produce no hazardous wastes.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CHEMICAL WASTE MANAGEMENT, INC.	CIVIL ACTION NO. 89-761-B
VERSUS	
PAUL H. TEMPLET, PH.D., SECRETARY OF THE LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY	(Filed Dec. 29, 1989)

STIPULATION

Plaintiff, Chemical Waste Management, Inc., and defendant, Paul H. Templet, Ph.D., Secretary of the Louisiana Department of Environmental Quality, hereby agree and stipulate to the following facts:

1.

Plaintiff owns and operates a hazardous waste treatment, storage and disposal facility in Carlyss, Louisiana.

2.

Plaintiff is authorized to conduct treatment, storage and disposal operations and related activities in accordance with interim status provisions of the Louisiana Hazardous Waste Regulations, promulgated pursuant to the Louisiana Environmental Quality Act, LSA-R.S. 30:2001, et seq.

3.

On or about September 27, 1989, the Louisiana Department of Environmental Quality issued a hazardous waste TSD facility permit to plaintiff. Said permit has been appealed by the plaintiff and the Court of Appeal, First Circuit, State of Louisiana, has issued an order staying the effectiveness of said permit pending resolution of plaintiff's appeal.

4.

By letter dated September 22, 1989, plaintiff notified the State of Louisiana, through the Department of Environmental Quality, and the United States Environmental Protection Agency, Region VI, that it plans to receive hazardous waste generated from a foreign source located in Mexico, namely, Inland System Business Unit of Inland/Matamoros, Mexico (Componentes Mecanicos De Matamoros, S.A. De C.V. facility). Said notification was made in accordance with 40 C.F.R. 264.12, promulgated pursuant to 24 [sic] USCS, Sect. 6901, et seq. A true and genuine copy of said notification is attached hereto as Exhibit "1".

5.

On October 12, 1989, Robert E. Layton, Jr., Regional Administer of Region VI of USEPA, responded by letter to the September 22, 1989 notice of Chemical Waste Management, Inc. of its intention to import foreign generated hazardous waste within the meaning of 40 C.F.R. 264.12.

A true and genuine copy of the letter is attached as Exhibit "2".

6.

By letter dated September 28, 1989, plaintiff notified the State of Louisiana, through the Department of Environmental Quality, and the United States Environmental Protection Agency, Region VI, that it plans to receive hazardous waste generated from a foreign source located in Mexico, namely, Trico Technologies of Matamoros, Mexico whose full name is Trico Componentes, S.A. De C.V. Said notification was made in accordance with 40 C.F.R. 264.12, promulgated pursuant to 24 [sic] USCS, Sect. 6901, et seq. A true and genuine copy of said notification is attached hereto as Exhibit "3".

7.

On or about October 12, 1989, Robert E. Layton, Jr., Regional Administer of Region VI of USEPA, responded by letter to the September 28, 1989 notice of Chemical Waste Management. Inc. of its intention to import foreign generated hazardous waste within the meaning of 40 C.F.R. 264.12. A true and genuine copy of the letter is attached as Exhibit "4".

8.

40 C.F.R. 262.60, "Imports of hazardous waste", provides that when importing hazardous waste, a person must meet all the requirements of 262.20(a) for manifests except that:

(1) In place of the generator's name, address and EPA identification number, the name and address of the foreign generator and the importer's name, address and EPA identification number must be used.

(2) In place of the generator's signature on the certification statement, the United States importer or his agent must sign and date the certification and obtain the signature of the initial transporter.

True and genuine copies of 40 C.F.R. 262.60 and 262.20(a) are attached hereto as Exhibits "5" and "6".

9.

La.R.S. 30:2173 defines "Hazardous Waste" as follows:

" . . . any waste, or combination of wastes, which because of its quantity, concentration, physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. Such definition shall be applied only to those wastes identified and designated as such by the department, consistent with applicable federal laws and regulations."

A true and genuine copy of La.R.S. 30:2173 is attached hereto as Exhibit "7".

10.

The rules and regulations for a hazardous waste management system are set forth in LAC 33:V. LAC 33:V.109 defines "Hazardous Waste". A true and genuine copy of LAC 33:V.109 is attached hereto as Exhibit "8".

11.

Attached as Exhibit "9" is a true and genuine copy of an "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" dated August 14, 1983, signed by President Ronald Reagan and Secretary of State, George P. Schultz for the United States of America, and DeLa Madrid and B. Sepulveda for the United Mexican States, and, as Exhibit "10", Annex III entered into pursuant to the "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area" dated November 12, 1986.

12.

Attached as Exhibit "11" is a true and genuine copy of a letter dated August 21, 1984 by William J. Guste, Jr., Attorney General, State of Louisiana, to the Environmental Protection Agency, Region VI.

13.

LAC 33:V, Chapter 11, establishes standards which apply to persons who generate hazardous waste within

the State of Louisiana, including but not limited to hazardous waste determination (LAC 33:V 1103) and preparedness and prevention (LAC 33:V 1115). Attached hereto as Exhibit "12" is a true and genuine copy of LAC 33:V, Chapter 11.

14.

LAC 33:V.915 provides that the operator of a hazardous waste facility accepting out-of-state wastes is responsible for all the requirements of Chapter 9, Manifests System for TSD Facilities, including requiring the generator to initiate a manifest. Attached hereto as Exhibit "13" is a true and genuine copy of LAC 33:V.915.

15.

Chapter 15 of LAC 33:V sets forth the standards with which all facilities which treat, store and dispose of hazardous wastes must comply, including but not limited to standards for the receiving and monitoring of incoming waste (33:V.1527) and hazardous waste, chemical and physical analysis (33:V.1519). Attached hereto as Exhibit "14" is a true and genuine copy of LAC 33:V, Chapter 15.

16.

LAC 33:V, Chapter 13 establishes standards which apply to persons transporting hazardous waste within the State of Louisiana, including but not limited to a manifest system (LAC 33:V.1307), spills (LAC 33:V.1315), use and reuse of containers (LAC 33:V.1319), and vehicle markings and placards (LAC 33:V.1323). Attached hereto as

Exhibit "15" is a true and genuine copy of LAC 33:V, Chapter 13.

17.

The aforedescribed generators, Inland System Business Unit of Inland/Matamoros, Mexico (Componentes Mecanicos De Matamoros, S.A., De C.V., H. Matamoros, Tam., Mexico) and Trico Componentes, S.A. De C.V. of Matamoros, Tampique, Mexico, are Maquiladoras or Mexican companies incorporated pursuant to the Mexican corporate law, that may be 100% foreign owned and 100% foreign managed, which are set up in Mexico for the purpose of carrying out industrial operations in Mexico pursuant to the decree for the development and operation of the Maquiladoras industry for exportation. Pursuant to the "Decree for the Development and Operation of the Maquiladoras Industry for Exportation", all machinery, equipment, tools and spare parts to [sic] can be imported into Mexico "in bond or without paying Mexican import duties or the applicable import duties that are covered with a bond." A true and genuine copy of the "Decree for the Development and Operation of the Maquiladoras Industry for Exportation" is attached hereto as Exhibit "16".

18.

Until a determination by this Court on all the issues presented by the Complaint of Chemical Waste Management, Inc., Chemical Waste Management, Inc. will not receive in the State of Louisiana for the purposes of treatment, storage or disposal in the State of Louisiana,

any "hazardous waste generated outside the United States and its territories".

19.

A state may be delegated the authority to administer the Resource Conservation and Recovery Act (RCRA) if the requirements of 40 C.F.R. Part 271 are met.

20.

40 C.F.R. 271.4, "Consistency", provides that a state program must be consistent with the federal program to obtain the delegation of authority referred to above. A true and genuine copy of the regulation is attached as Exhibit "17".

21.

The State of Louisiana received interim authorization to administer and enforce certain portions of RCRA. Authorization was received for Phase I on December 19, 1980 and for Phase II on January 24, 1984. Final authorization of these certain portions was received on January 31, 1985. A true and genuine copy of the pertinent portion of the Federal Register is attached as Exhibit "18".

22.

40 C.F.R. 271.1, "Purpose and Scope", provides a state may enforce provisions "that are more stringent or more extensive than those required under this subpart"

and operate "a program with a greater scope of coverage". A true and genuine copy of the regulation is attached as Exhibit "19".

23.

Inland System Business Unit of Inland/Matamoros, Mexico (Componentes Mecanicos De Matamoros, S.A. De C.V., H. Matamoros, Tam., Mexico), **Inland-Mexico,** will ship the hazardous waste which is identified as waste subject to Article XI of Annex III of the agreement referred to in paragraph 11 of this stipulation and generated at its facility in Mexico via, Valley Solvents, Inc. through Texas to Carlyss, Louisiana. Valley Solvents, Inc. is the United States transporter-importer.

24.

Trico Componentes S.A. De C.V. of Matamoros, Tampique, Mexico, a Mexican corporation, **Trico-Mexico,** will ship the hazardous waste which is identified as waste subject to Article XI of Annex III of the agreement referred to in paragraph 11 of this stipulation and generated at its facility in Mexico to Trico Technologies Corporation, a Delaware corporation (Trico-USA). Trico-USA will transport the waste to Trico-USA's facility located at 1995 Billy Mitchell Road, Brownsville, Texas 78521 and Trico-USA will be designated as the United States importer of the waste. From Brownsville, the waste will be transported by Texas Ecology, Inc. to Chemical Waste Management, Inc. in Carlyss, Louisiana.

25.

The designated authority of Mexico, as the country of export, has not notified the designated authority of the United States, as the country of import, of the hazardous waste shipments identified in paragraphs 4 and 6 of this stipulation.

26.

Attached hereto as Exhibits "20-A" and "20-B" are true and genuine copies of portions of Mexican regulatory law pertaining to hazardous materials, particularly excerpts from "The General Law of Ecological Equilibrium and Environmental Protection" and "Regulations to the General Law of Ecological Equilibrium and Environmental Protection Relating to Hazardous Materials."

Respectfully submitted,

/s/ Anne J. Crochet
Gerald L. Walter, Jr., T.A. – #13213
Anne J. Crochet – #2010
SCHWAB & WALTER
10636 Linkwood Court
Baton Rouge, LA 70810
Telephone: (504) 767-1460

/s/ John B. King
John B. King, T.A. – 13332
Ann Coco – 4222
Office of Legal Affairs &
Enforcement
Department of Environmental
Quality
P.O. Box 44066
Baton Rouge, LA 70804
Telephone: (504) 342-1240

MEXICO

Environmental Cooperation

Agreement signed at La Paz August 14, 1983;
Entered into force February 16, 1984.

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES ON COOPERATION FOR THE PROTECTION AND IMPROVEMENT OF THE ENVIRONMENT IN THE BORDER AREA

The United States of America and the United Mexican States,

RECOGNIZING the importance of a healthful environment to the long-term economic and social well-being of present and future generations of each country as well as of the global community;

RECALLING that the Declaration of the United Nations Conference on the Human Environment, proclaimed in Stockholm in 1972,[1] called upon nations to collaborate to resolve environmental problems of common concern;

NOTING previous agreements and programs providing for environmental cooperation between the two countries;

BELIEVING that such cooperation is of mutual benefit in coping with similar environmental problems in each country;

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[1] *Department of State Bulletin*, July 24, 1972, p. 116.

ACKNOWLEDGING the important work of the International Boundary and Water Commission and the contribution of the agreements concluded between the two countries relating to environmental affairs;

REAFFIRMING their political will to further strengthen and demonstrate the importance attached by both Governments to cooperation on environmental protection and in furtherance of the principle of good neighborliness;

Have agreed as follows:

ARTICLE 1

The United States of America and the United Mexican States, hereinafter referred to as the Parties, agree to cooperate in the field of environmental protection in the border area on the basis of equality, reciprocity and mutual benefit. The objectives of the present Agreement are to establish the basis for cooperation between the Parties for the protection, improvement and conservation of the environment and the problems which affect it, as well as to agree on necessary measures to prevent and control pollution in the border area, and to provide the framework for development of a system of notification for emergency situations. Such objectives shall be pursued without prejudice to the cooperation which the Parties may agree to undertake outside the border area.

ARTICLE 2

The Parties undertake, to the fullest extent practical, to adopt the appropriate measures to prevent, reduce and

eliminate sources of pollution in their respective territory which affect the border area of the other.

Additionally, the Parties shall cooperate in the solution of the environmental problems of mutual concern in the border area, in accordance with the provisions of this Agreement.

ARTICLE 3

Pursuant to this Agreement, the Parties may conclude specific arrangements for the solution of common problems in the border area, which may be annexed thereto. Similarly, the Parties may also, agree upon annexes to this Agreement on technical matters.

ARTICLE 4

For the purposes of this Agreement, it shall be understood that the "border area" refers to the area situated 100 kilometers on either side of the inland and maritime boundaries between the Parties.

ARTICLE 5

The Parties agree to coordinate their efforts, in conformity with their own national legislation and existing bilateral agreements to address problems of air, land and water pollution in the border area.

ARTICLE 6

To implement this Agreement, the Parties shall consider and, as appropriate, pursue in a coordinated manner practical, legal, institutional and technical measures for protecting the quality of the environment in the border area. Forms of cooperation may include: coordination of national programs; scientific and educational exchanges; environmental monitoring; environmental impact assessment; and periodic exchanges of information and data on likely sources of pollution in their respective territory which may produce environmentally polluting incidents, as defined in an annex to this Agreement.

ARTICLE 7

The Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects.

ARTICLE 8

Each Party designates a national coordinator whose principal functions will be to coordinate and monitor implementation of this Agreement, make recommendations to the Parties, and organize the annual meetings referred to in Article 10, and the meetings of the experts referred to in Article 11. Additional responsibilities of the

national coordinators may be agreed to in an annex to this Agreement.

In the case of the United States of America the national coordinator shall be the Environmental Protection Agency, and in the case of Mexico it shall be the Secretaría de Desarrollo Urbano y Ecología, through the Subsecretaría de Ecología.

ARTICLE 9

Taking into account the subjects to be examined jointly, the national coordinators may invite, as appropriate, representatives of federal, state and municipal governments to participate in the meetings provided for in this Agreement. By mutual agreement they may also invite representatives of international governmental or non-governmental organizations who may be able to contribute some element of expertise on problems to be solved.

The national coordinators will determine by mutual agreements the form and manner of participation of non-governmental entities.

ARTICLE 10

The Parties shall hold at a minimum an annual high level meeting to review the manner in which this Agreement is being implemented. These meetings shall take place alternately in the border area of Mexico and the United States of America.

The composition of the delegations which represent each Party, both in these annual meetings as well as in the

meetings of experts referred to in Article 11, will be communicated to the other Party through diplomatic channels.

ARTICLE 11

The Parties may, as they deem necessary, convoke meetings of experts for the purposes of coordinating their national programs referred to in Article 6, and of preparing the drafts of the specific arrangements and technical annexes referred to in Article 3.

These meetings of experts may review technical subjects. The opinions of the experts in such meetings shall be communicated by them to the national coordinators, and will serve to advise the Parties on technical matters.

ARTICLE 12

Each Party shall ensure that its national coordinator is informed of activities of its cooperating agencies carried out under this Agreement. Each Party shall also ensure that its national coordinator is informed of the implementation of other agreements concluded between the two Governments concerning matters related to this Agreement. The national coordinators of both Parties will present to the annual meetings a report on the environmental aspects of all joint work conducted under this Agreement and on implementation of other relevant agreements between the Parties, both bilateral and multilateral.

Nothing in this Agreement shall prejudice or otherwise affect the functions entrusted to the International

Boundary and Water Commission, in accordance with the Water Treaty of 1944.[1]

ARTICLE 13

Each Party shall be responsible for informing its border states and for consulting them in accordance with their respective constitutional systems, in relation to matters covered by this Agreement.

ARTICLE 14

Unless otherwise agreed, each Party shall bear the cost of its participation in the implementation of this Agreement, including the expenses of personnel who participate in any activity undertaken on the basis of it.

For the training of personnel, the transfer of equipment and the construction of installations related to the implementation of this Agreement, the Parties may agree on a special modality of financing, taking into account the objectives defined in this Agreement.

ARTICLE 15

The Parties shall facilitate the entry of equipment and personnel related to this Agreement, subject to the laws and regulations of the receiving country.

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[1] Treaty relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande. Signed at Washington Feb. 3, 1944 and supplementary protocol signed Nov. 14, 1944. TS 994; 59 Stat. 1219.

In order to undertake the monitoring of polluting activities in the border area, the Parties shall undertake consultations relating to the measurement and analysis of polluting elements in the border area.

ARTICLE 16

All technical information obtained through the implementation of this Agreement will be available to both Parties. Such information may be made available to third parties by the mutual agreement of the Parties to this Agreement.

ARTICLE 17

Nothing in this Agreement shall be construed to prejudice other existing or future agreements concluded between the two Parties, or affect the rights and obligations of the Parties under international agreements to which they are a party.

ARTICLE 18

Activities under this Agreement shall be subject to the availability of funds and other resources to each Party and to the applicable laws and regulations in each country.

ARTICLE 19

The present Agreement shall enter into force upon an exchange of Notes stating that each Party has completed its necessary internal procedures.[1]

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[1] Feb. 16, 1984.

ARTICLE 20

The present Agreement shall remain in force indefinitely unless one of the Parties notifies the other, through diplomatic channels, of its desire to denounce it, in which case the Agreement will terminate six months after the date of such written notification. Unless otherwise agreed, such termination shall not affect the validity of any arrangements made under this Agreement.

ARTICLE 21

This Agreement may be amended by the agreement of the Parties.

ARTICLE 22

The adoption of the annexes and of the specific arrangements provided for in Article 3, and the amendments thereto, will be effected by an exchange of Notes.[1]

ARTICLE 23

This Agreement supersedes the exchange of Notes, concluded on June 19, 1978 with the attached Memorandum of Understanding between the Environmental Protection Agency of the United States and the Subsecretariat for Environmental Improvement of Mexico

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[1] Annexes subsequently agreed to by the parties are on file in the Office of Treaty Affairs, Department of State.

for Cooperation on Environmental Programs and Transboundary Problems.[2]

DONE in duplicate, in the city of La Paz, Baja California, Mexico, on the 14th of August of 1983, in the English and Spanish languages, both texts being equally authentic.

/s/ Ronald Reagan[3]
FOR THE UNITED STATES OF AMERICA:

/s/ George P. Shultz[4]

/s/ Illegible[5]
FOR THE UNITED MEXICAN STATES:

/s/ B. Illegible[6]

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[2] TIAS 9264; 30 UST 1574.

[3] Ronald Reagan.

[4] George P. Shultz.

[5] De la Madrid.

[6] B. Sepulveda.

ANNEX III TO THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES ON COOPERATION FOR THE PROTECTION AND IMPROVEMENT OF THE ENVIRONMENT IN THE BORDER AREA

AGREEMENT OF COOPERATION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES REGARDING THE TRANSBOUNDARY SHIPMENTS OF HAZARDOUS WASTES AND HAZARDOUS SUBSTANCES

PREAMBLE

The Government of the United States of America ("the United States"), and the Government of the United Mexican States ("Mexico"), ("the Parties"),

Recognizing that health and environmental damage may result from improper activities associated with hazardous waste;

Realizing the potential risks to public health, property and the environment associated with hazardous substances;

Seeking to ensure that activities associated with the transboundary shipment of hazardous waste are conducted so as to reduce or prevent the risks to public health, property and environmental quality, by effectively cooperating in regard to their export and import;

Seeking also to safeguard the quality of public health, property and environment from unreasonable risks by effectively regulating the export of hazardous substances;

Considering that transboundary shipments of hazardous waste and hazardous substances between the Parties, if carried out illegally and thus without the supervision and control of the competent authorities, or if improperly managed could endanger the public health, property and environment, particularly in the United States/Mexico border area;

Recognizing that the close trading relationship and the long common border between the Parties make it necessary to cooperate regarding transboundary shipments of hazardous waste and hazardous substances without unreasonably affecting the trade of goods and services;

Reaffirming Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, which provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction;

Recognizing that Article 3 of the Agreement between the Parties on Cooperation for the Protection and Improvement of the Environment in the Border Area of 1983 provides that the Parties may conclude specific arrangements for the solution of common problems in the border area as annexes to that Agreement;

Have agreed as follows:

ARTICLE I

Definitions

1. "Designated Authority" means, in the case of the United States, the Environmental Protection Agency and, in the case of Mexico, the Secretariat of Urban Development and Ecology through the Subsecretariat of Ecology.

2. "Hazardous waste" means any waste, as designated or defined by the applicable designated authority pursuant to national policies, laws or regulations, which if improperly dealt with in activities associated with them, may result in health or environmental damage.

3. "Hazardous substance" means any substance, as designated or defined by the applicable national policies, laws or regulations, including pesticides or chemicals, which when improperly dealt with in activities associated with them, may produce harmful effects to public health, property or the environment, and is banned or severely restricted by the applicable designated authority.

4. "Activities" associated with hazardous waste or hazardous substances means, as applicable, their handling, transportation, treatment, recycling, storage, application, distribution, reuse or other utilization.

5. "Country of export" means the Party from which the transboundary movement of hazardous waste or hazardous substances is to be initiated.

6. "Country of import" means the Party to which the hazardous waste or hazardous substances are to be sent. This does not include "transit", as meaning transport of hazardous waste or hazardous substances through

the territory of a Party without being imported through its Customs under applicable laws and regulations.

7. "Consignee" means the facility in the country of import which will ultimately receive the hazardous waste or hazardous substances.

8. "Exporter" means the physical or juridical person, whether public or private, acting on his behalf or as a contractor or subcontractor expressly or implicitly defined as exporter under the national laws and regulations of the country of export which specifically govern hazardous waste or hazardous substances.

9. "Banned or severely restricted" means final regulatory action, as designated or defined by the applicable designated authority, pursuant to national policies, laws or regulations:

a) Prohibiting, cancelling or suspending all or virtually all registered uses of a pesticide for human health or environmental reasons.

b) Prohibiting or severely limiting the manufacture, processing, distribution or use of a chemical for human health or environmental reasons.

ARTICLE II

General Obligations

1. Transboundary shipments of hazardous waste and hazardous substances across the common border of the Parties shall be governed by the terms of this Annex and their domestic laws and regulations.

2. Each Party shall ensure, to the extent practicable, that its domestic laws and regulations are enforced with respect to transboundary shipments of hazardous waste and hazardous substances, and other substances as the Parties may mutually agree through appendices to this Annex, that pose dangers to public health, property and the environment.

3. Each Party shall cooperate in monitoring and spot-checking transboundary shipments across the common border of hazardous waste and hazardous substances to ensure, to the extent practicable, that such shipments conform to the requirements of this Annex and its national laws and regulations. To this effect, a program of cooperation in this area should be concluded through an Appendix to this Annex, including the exchange of information resulting from the monitoring and spot-checking of transboundary shipments which may be useful to the other Party.

HAZARDOUS WASTE

ARTICLE III

Notification to the Importing Country

1. The designated authority of the country of export shall notify the designated authority of the country of import of transboundary shipments of hazardous waste for which the consent of the country of import is required under the laws or regulations of the country of export, with a copy of the notification simultaneously sent through diplomatic channels.

2. The notification referred to in paragraph 1 of this Article shall be given at least 45 days in advance of the planned date of export and may cover an individual shipment or a series of shipments extending over a twelve-month or lesser period and shall contain the following information for each shipment:

a) The exporter's name, address, telephone number, identification number and other relevant data required in the country of export.

b) By consignee, for each hazardous waste type:

i) A description of the hazardous waste to be exported, as identified by the waste identification number(s) and the shipping description(s) required in the country of export.

ii) The estimated frequency or rate at which such waste is to be exported and the period time over which such waste is to be exported.

iii) The estimate total quantity of the hazardous waste in units as specified by the manifest or documents required in the country of export.

iv) The point of entry into the country of import.

v) The means of transportation, including the mode of transportation and the type of container involved.

vi) A description of the treatment or storage to which the waste will be subjected in the country of import.

vii) The name and site address of the consignee.

3. In order to facilitate compliance with the requirements of the importing country for the exporter to provide information and documents additional to those described in paragraph 2 of this Article, the designated authority of the exporting country will cooperate by making such requirements for information and documents known to the exporter. To that end, the country of import may list such additional required information and documents in appendices to this Annex.

4. The designated authority of the country of import shall have 45 days from the date of acknowledgement of receipt of the notification provided in paragraph 1 of this Article within which to respond to such notification, indicating its consent, with or without conditions, or its objection to the export.

5. The country of import shall have the right to amend the terms of the proposed shipment contained in the notification in order to give its consent.

6. The consent of the country of import provided pursuant to paragraphs 4 and 5 of this Article, may be withdrawn or modified at any time, pursuant to the national policies, laws or regulations of the country of import.

7. Whenever the designated authority of a country of export requires notification of or is otherwise aware of a transboundary shipment that will be transported through the territory of the other Party, it shall, in accordance with its national laws and regulations, notify that Party.

ARTICLE IV

Readmission of Exports

The country of export shall readmit any shipment of hazardous waste that may be returned for any reason by the country of import.

HAZARDOUS SUBSTANCES

ARTICLE V

Notification of Regulatory Actions

1. When a Party has banned or severely restricted a pesticide or chemical, its designated authority shall notify the designated authority of the other Party that such action has been taken, either directly or through an appropriate intergovernmental organization.

2. The notice referred to in paragraph 1 of this Article shall contain the following information, if available:

(a) the name of the pesticide or chemical that is the object of the regulatory action;

(b) a concise summary of the regulatory action taken, including the timetable for any further actions that are planned. If the regulatory action bans or restricts certain uses but allows other uses, such information should be included;

(c) a concise summary of the reason for the regulatory action, including an indication of the potential risks to human health or the environment that are the grounds for the action;

(d) information concerning registered pesticides or substitute chemicals that could be used in lieu of the banned or severely restricted pesticide or chemical;

(e) the name and address of the contact point to which a request for further information should be addressed.

ARTICLE VI

Notification of Exports

1. If the country of export becomes aware that an export of a hazardous substance to the country of import is occurring, the designated authority of the country of export shall notify the designated authority of the country of import.

2. The purpose of such notice shall be to remind the country of import of the notification regarding regulatory action provided pursuant to Article 5 and to alert it to the fact that the export is occurring.

3. The notice referred to in paragraph 1 of this Article shall contain the following information, if available:

(a) the name of the exported hazardous substance;

(b) for banned or severely restricted chemicals, approximate date(s) of the export;

(c) a copy of, or reference to, the information provided at the time of the notification of the regulatory action;

(d) name and address of the contact point for further information.

ARTICLE VII

Timing of the Notifications

1. Notification of regulatory actions, required pursuant to Article 5, shall be transmitted as soon as practicable after the regulatory action has been taken, and in any event not later than 90 days following the taking of such action.

2. When a Party has banned or severely restricted chemicals or pesticides prior to the entry into force of this Annex, its designated authority shall provide an inventory of such prior regulatory actions to the designated authority of the other Party.

3. Notification of exports required pursuant to Article 6, shall be provided at the time the first export of a hazardous substance is occurring to the Country of import following the regulatory action and should recur at the time of the first export of the hazardous substance each subsequent year to that country.

4. When the hazardous substance being exported has been banned or severely restricted prior to the entry into force of this Annex, the first export following the regulatory action shall be considered to be the first export following the provision of the inventory referred to in paragraph 2 of this Article.

ARTICLE VIII

Compliance with Requirements in the Importing Country

In order to facilitate compliance with the requirements in the importing country for the import of

hazardous substances, the designated authority of the country of export will cooperate by making such requirements, including expected information and documents, known to the exporter. To that end, the country of import may list such requirements, information and documents in appendices to this Annex.

ARTICLE IX

Readmission of Exports

The country of export shall readmit any shipment of hazardous substances that was not lawfully imported into the country of import.

GENERAL PROVISIONS

ARTICLE X

Additional Arrangements

1. The Parties shall consider and, as appropriate, establish additional arrangements to mitigate or avoid adverse effects on health, property and the environment from improper activities associated with hazardous waste and hazardous substances. Such arrangements may include the sharing of research data as well as the definition of criteria regarding imminent and substantial endangerment and emergency responses, and may be included in appendices to this Annex.

2. The Parties shall consult regarding experience with transboundary shipments of hazardous wastes and hazardous substances and, as problems are identified in the special circumstances of the United States-Mexico

border relationship may include through appendices to this Annex, additional cooperation and mutual obligations aimed at achieving when necessary a more stringent control of transboundary shipments, such as provisions to bring uniformity in those relating to both hazardous wastes and hazardous substances regarding compulsory notification to and consent by the importing country for each transboundary shipment, as may become permitted by new national laws and regulations adopted by the Parties.

ARTICLE XI

Hazardous Waste Generated From Raw Materials Admitted In-Bond

Hazardous waste generated in the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations.

ARTICLE XII

Information Exchange and Assistance

1. The Parties shall, to the extent practicable, provide to each other mutual assistance designed to increase the capability of each Party to enforce its laws applicable to transboundary shipments of hazardous waste or hazardous substances and to take appropriate action with respect to violations of its laws.

(a) Such assistance may generally include:

(i) the exchange of information;

(ii) the provision of documents, records and reports;

(iii) the facilitating of on-site visits to treatment, storage, or disposal facilities;

(iv) assistance provided or required pursuant to any international agreements or treaties in force with respect to the Parties, or pursuant to any arrangement or practice that might otherwise be applicable;

(v) emergency notification of hazardous situations; and

(vi) other forms of assistance mutually agreed upon by the Parties.

(b) Save in exceptional circumstances, requests for assistance made pursuant to this Article shall be submitted in writing and translated into the language of the requested State.

(c) The requested State shall provide the requesting State with copies of publicly available records of government departments and agencies in the requested State.

(d) The requested State may provide any record or information in the possession of a government office or agency, but not publicly available, to the same extent and under the same conditions as it would be available to its own administrative, law enforcement, or judicial authorities.

2. The Parties may establish in an appendix to this Annex a cooperative program relating to the exchange of scientific, technical, and other information for purposes of the development of their own respective regulatory mechanisms controlling hazardous waste and hazardous substances.

ARTICLE XIII

Protection of Confidential Information

The Parties shall adopt procedures to protect the confidentiality of proprietary or sensitive information conveyed pursuant to this Annex, when such procedures do not already exist.

ARTICLE XIV

Damages

1. The country of import may require, as a condition of entry, that any transboundary shipment of hazardous waste or hazardous substances be covered by insurance, bond or other appropriate and effective guarantee.

2. Whenever a transboundary shipment of hazardous waste or hazardous substances is carried out in violation of this Annex, of the national laws and regulations of the Parties, or of the conditions to which the authorization for import was subject, or whenever the hazardous waste or hazardous substances produce damages to public health, property or the environment in the country of import, the competent authorities of the country of export shall take all practicable measures and initiate and carry

out all pertinent legal actions that they are legally competent to undertake, so that when applicable in accordance with its national laws and regulations the physical or juridical persons involved:

a) return the hazardous waste or hazardous substances to the country of export;

b) return in as much as practicable the *status quo ante* of the affected ecosystem;

c) repair, through compensation, the damages caused to persons, property or the environment.

The country of import shall also take, for the same purposes, all practicable measures and initiate and carry out all pertinent legal actions that its authorities are legally competent to undertake.

The country of export shall report to the country of import all measures and legal actions undertaken in the framework of this paragraph, and shall cooperate with the country of import, on the basis of this Annex or of other bilateral treaties and agreements in force between the Parties, and to the extent permitted by its national laws and regulations, to seek in its courts the satisfaction of those matters covered in subparagraphs a) to c) of this paragraph.

3. The provisions of this Annex shall not be deemed to abridge or prejudice the Parties' national laws concerning transboundary shipments, or liability or compensation for damages resulting from activities associated with hazardous waste and hazardous substances.

ARTICLE XV

Effect On Other Instruments

1. Nothing in this Annex shall be construed to prejudice other existing or future agreements concluded between the Parties, or affect the rights or obligations of the Parties under international agreements to which they are Party.

2. The provisions of this Annex shall, in particular, not be deemed to prejudice or otherwise affect the functions entrusted to the International Boundary and Water Commission, in accordance with the 1944 Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande.

ARTICLE XVI

Appendices

Any appendices to this Annex may be added through an exchange of diplomatic notes and shall form an integral part of this Annex.

ARTICLE XVII

Amendment

This Annex, and any appendices added hereto, may be amended by mutual agreement of the Parties through an exchange of diplomatic notes.

ARTICLE XVIII

Review

The Parties shall meet at least every two years from the date of entry into force of this Annex, at a time and place to be mutually agreed upon, in order to review the effectiveness of its implementation and to agree on whatever individual and joint measures are necessary to improve such effectiveness.

ARTICLE XIX

Entry into Force

This Annex shall enter into force upon an exchange of diplomatic notes between the Parties stating that each Party has completed its necessary internal procedures.

ARTICLE XX

Termination

This Annex shall remain in force indefinitely, unless one of the Parties notifies the other in writing through diplomatic channels of its desire to terminate it, in which case the Annex shall terminate six months after the date of such written notification. Unless otherwise agreed, such termination shall not affect the validity of any agreements made under this Annex.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed this Annex.

DONE at Washington, in duplicate, this twelfth day of November, 1986 in the English and Spanish languages, both texts being equally authentic.

/s/ Illegible
FOR THE GOVERNMENT
OF THE UNITED
STATES OF AMERICA:
Illegible

Illegible
FOR THE
GOVERNMENT OF
THE UNITED
MEXICAN STATES:
Illegible